Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1998

SANDRA MORTHAM, SECRETARY OF STATE, AND THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, CHARLES STEWART, DOROTHY ROBERTS, BARBARA KING, PEARLIE WILLIAMS, LOUVENIA JONES, ROSA HENDERSON, DELORES COLSTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Richard M. Dunn
Counsel of Record
Mitchell E. Widom
Sherril M. Colombo
BILZIN SUMBERG DUNN PRICE & AXELROD LLP
2500 First Union Financial Center
Miami, Florida 33131
(305) 374-7580

Attorneys for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

Whether a plaintiff claiming that he was not promoted, or not hired, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* can be required to show as part of the prima facie case that he is equally or more qualified than the successful applicant under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)?

In a Title VII race discrimination case based upon the alleged failure to promote, or to hire, is the employer required to present testimony from the decision-maker in order to meet its burden of articulating some legitimate, nondiscriminatory reason for the employer's decision under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) framework and in the absence of presenting such testimony is the plaintiff entitled to a judgment against the employer for discrimination?

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Sandra B. Mortham, as Secretary of State of the State of Florida and the State of Florida, petitions for a writ of certiorari to the United States Supreme Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals (App. A., *infra*, 1a-56a) was issued on October 28, 1998 and is reported at 158 F.3d 1177 (11th Cir. 1998). The opinion of the United States District Court for the Northern District of Florida (App. B, *infra*, 57a-86a) was issued on May 19, 1995. The Order denying Petitioners' Suggestion of Rehearing (or Hearing) En Banc (App. C, *infra* 87a-88a) was issued on December 31, 1998. This Court has jurisdiction pursuant to Rules 10(a) and 10(c) of the Supreme Court Rules.

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is involved in this petition and is contained in Appendix D, *infra* 89a. This provision states that:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original;

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)(2).

STATEMENT OF THE CASE

In 1979, this litigation was commenced as a class action lawsuit in the District Court for the Northern District of Florida ("District Court") by ten plaintiffs and a nonprofit corporation, Increased Minority Participation by Affirmative Change Today of Northwest Florida, Inc., (a nonprofit corporation) (collectively "Respondents"), against the State of Florida and George Firestone, in his capacity as Secretary of State (collectively "Petitioners"),[1] alleging racial discrimination against Respondents in hiring and promotions in violation of 42 U.S.C.

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[1] Sandra Mortham is the current Secretary of the State and was substituted for Firestone's successor, Jim Smith.

§§ 1981, 1983 and Title VII.[2] (R1-1).[3] Plaintiffs[4] sought equitable relief, including injunctive relief, back and front pay, and attorney's fees and costs.

On November 7, 1980, the District Court certified the litigation as a class action consisting of all past, present and future black persons employed by the Florida Department of State and all past, present and future black applicants for employment with the Florida Department of State. (R3-148). The District Court decertified the class approximately five years later, on September 17, 1984, because the record disclosed that the representative was not financially able to continue class representation. (R14-553). On December 17, 1985, Plaintiffs attempted to recertify the class (R15-593), but their request was denied on January 22, 1986. (R15-603). The case then proceeded to trial only on the claims of racial discrimination under the theories of disparate treatment and disparate impact.

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[2] The court of appeals has concluded that only the Title VII claim remains in this case.

[3] Record references refer to the record before the court of appeals. The cite refers to the type of record, volume number, document number, and page number.

[4] The term "plaintiffs" refers to all plaintiffs that claimed discrimination in employment decisions, other than Gracie Holton (whose claim is no longer an issue) and the claims by Increase Minority Participation by Affirmative Change Today of North West Florida, Inc., which was dismissed for lack of standing by the District Court.

A bench trial took place on April 1, 1986. At trial, Petitioners presented six days of testimony that showed the individuals selected for the positions at issue were more qualified than the Plaintiffs. *Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc., (IMPACT) v. Firestone*, 893 F.2d 1189, 1199 (11th Cir. 1990) (Edmondson, J., concurring in part, dissenting in part), *cert. denied*, 498 U.S. 847 (1990) (referred to as *IMPACT I*) (R21-799.) The Petitioners supplied applications and personnel cards in support of their position that the person thought to be the most highly qualified was hired. *Id.* With regard to other positions, Petitioners offered testimony to show why the particular plaintiff was considered less qualified. *Id.* The District Court concluded that the Petitioners "more than sufficiently sustained its light burden of articulation with regard to each position" sought. (R17-664-7). At the close of Plaintiffs' case, the District Court dismissed the disparate impact claims. (R40-5). The District Court did not rule on Petitioners' motion for involuntary dismissal, which was premised on the argument that the Plaintiffs failed to prove a prima facie case. (R40-7).

On August 11, 1986 the District Court issued its findings of fact and conclusions of law and rendered judgment in favor of Petitioners. (R17-664). The District Court in analyzing Plaintiffs' claims under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) framework concluded, although without deciding, that Plaintiffs made out a prima facie case. (R17-664-6). In citing to *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, the District Court held that the elements to establish a prima facie case requires evidence that: 1) the plaintiff belongs to a racial minority; 2) the plaintiff applied for, and was qualified for, a job

for which the employer was seeking applicants; 3) the plaintiff was rejected despite being qualified, and 4) after the plaintiff was rejected the position remained open and the employer continued to seek applicants with plaintiff's qualifications. *Id.*

In determining whether plaintiffs met their burden of establishing that the reasons submitted by Petitioners were merely a pretext for discrimination, the District Court concluded that Plaintiffs failed to show that the Petitioners' legitimate, non-discriminatory reasons were a pretext for racial discrimination. (R17-664-8.) In analyzing each claim, the District Court held that Plaintiffs did not sustain their burden of establishing that the selectee had qualifications equal to or less than those of the particular plaintiff, or other evidence demonstrating pretext. *Id.* at p. 15.

Plaintiffs appealed to the Eleventh Circuit Court of Appeals contending that the District Court erred by 1) determining that Petitioners met their burden of articulating a legitimate, non-discriminatory reason for the employment decisions when the trial court assumed that a prima facie case was made; 2) not making a specific finding that a prima facie case was made based on the expert testimony offered by Plaintiffs; 3) eliminating testing evidence from the scope of discovery; 3) dismissing plaintiff Gracie Holton's claims; and 4) decertifying the class and denying the motion to recertify the class. *IMPACT I*, 893 F.2d 1189. The Eleventh Circuit reversed in part and remanded for further determinations. *Id.* at 1197. The Eleventh Circuit held that the Petitioners did not meet their burden under the *Burdine* analysis because they did not offer proof by any person who made the employment decision or by any other person stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person.

Id. at 1194. The case was remanded for the District Court to determine whether a prima facie case was made by any of the Plaintiffs on their claims. *Id.* at 1194-95.

On remand, the District Court again reviewed the 67 positions at issue, the qualifications of the successful selectee and the qualifications of the Plaintiffs with respect to the positions sought. *Id.* at pp. 5-27. The District Court, in citing to *McDonnell Douglas*, held that in order to establish a prima facie case, the plaintiff must prove by a preponderance of the evidence "(1) that he is a member of a protected class; (2) that the adverse action was taken against him, e.g. discharge, demotion, failure to hire, or failure to promote; (3) that a person not a member of the protected class with equal or lesser qualifications received the position; and (4) that he applied for and was qualified for the position." (R22-899-4.) In all cases, the Plaintiffs proved the first element and, except in a few instances, they showed that they were qualified for their respective positions. *Id.* The District Court, focusing on the second and third prongs of the prima facie case, held that none of the Plaintiffs satisfied their burden of establishing a prima facie case. *Id.* at p. 31.

On appeal to the Eleventh Circuit Court of Appeals, the Plaintiffs argued that the District Court used the wrong legal standard by requiring them to prove that a person not a member of the protected class with "equal or lesser qualifications" received the job. Plaintiffs further claimed that the District Court erred by refusing to allow the Plaintiffs to pursue their claims concerning employment tests, and in refusing to recertify the class. The Eleventh Circuit issued its opinion on October 28, 1998 wherein it held that the District Court misapplied the law when evaluating the prima facie strength of the Plaintiffs' claims. *Walker v. Mortham*, 158 F.3d 1177 (11th Cir. 1998) (referred to

as *IMPACT II*) (App.A *infra.*) The Eleventh Circuit concluded that the District Court erred when it required each plaintiff to prove that he or she was equally or more qualified than the successful applicant for each employment position in question, and that the District Court erred when it required the plaintiffs to identify the successful applicants for the position by name. *Id.* at p. 30. The court's holding is that in all disparate treatment discrimination cases where the failure to promote or hire is at issue, the only method for the plaintiff to establish a prima facie case is for the plaintiff to show that: 1) he is a member of a protected group under Title VII; 2) he sought and was qualified for the position; 3) despite the plaintiff's qualifications the plaintiff was rejected; and 4) after the plaintiff's rejection, the employer either continued to attempt to fill the position, or filled the position with a person outside of the plaintiff's protected class. *Id.* at p. 16-17. The Eleventh Circuit further held that "although the Court in *McDonnell Douglas* noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, *see McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S. Ct. at 1824 n.13, we believe that *it is generally unwise to fragment the applicable legal standards in this area*." *Id.* at p. 15 (emphasis added). The Eleventh Circuit also found error by the District Court in requiring the plaintiffs to identify the successful applicants by name because under the *McDonnell Douglas* prima facie framework, a plaintiff is only required to establish that the successful applicant is not within her protected class. *Id.* at p. 30.

Upon review of the Plaintiffs' claims under the adopted method for establishing a prima face case, the Eleventh Circuit held that some of the claims passed muster, and these claims were remanded to the District Court to make a credibility finding on the evidence. *Id.* The court in *IMPACT II* also held that if the

District Court on remand determines that the Plaintiffs' evidence is credible in establishing the elements of a prima facie case, then the District Court must enter judgment in favor of the particular plaintiff on that claim. *Id.* at n. 31. For other claims, the Eleventh Circuit affirmed the judgment of the District Court for the Petitioners on the basis that the Plaintiffs failed to present evidence sufficient to support a prima facie case. *Id.* at pp. 34-36. The issue of recertification was left open upon remand. *Id.* at p. 37.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH BOTH SUPREME COURT PRECEDENT AND OTHER CIRCUIT COURTS OF APPEAL FOR THE ESTABLISHMENT OF A PRIMA FACIE CASE UNDER THE *MCDONNELL DOUGLAS* BURDEN SHIFTING FRAMEWORK

A. The Eleventh Circuit Opinion Conflicts with Supreme Court Precedent by Requiring that in a Promotion or Hiring Case The Relative Qualifications Between the Plaintiff and the Successful Applicant Can Never Be an Element of the Prima Facie Case

The Eleventh Circuit's opinion in *IMPACT II* rejected the numerous decisions in the Supreme Court as well as the Eleventh Circuit, which hold that a plaintiff may be required as part of the prima facie case to prove that he or she was as qualified, or more qualified, than the successful applicant. The Eleventh Circuit also rejected this Court's axiom that the prima facie case is a

flexible, and not a mechanical or rigid formula. The petition for writ of certiorari should be granted on this basis alone.

The criteria adopted by the Eleventh Circuit was contained in the former Fifth Circuit's opinion in *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980) wherein the court held that in order to show a prima facie case of racial discrimination, the plaintiff must only show that: he is a member of a protected group; he sought and was qualified for the position that the defendant was attempting to fill; despite his qualifications he was rejected; and that after this rejection, defendant either continued to attempt to fill the position or filled the position with a white employee. *Id.* at 1315.[5]

Importantly, the decision in *IMPACT II* results in a conflict with previous Supreme Court precedent. *See McDonnell*

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[5] By adopting *Crawford* for the prima facie case elements in every promotion or hire case, the Eleventh Circuit implicitly overruled the more recent line of Eleventh Circuit case law which expressly provides that in order to establish a prima facie case for a failure to promote, a plaintiff must show, among other factors, that he was equal to or more qualified than the successful applicant. *E.g., Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642-44 (11th Cir. 1998); *Combs v. Plantations Patterns*, 106 F.3d 1519, n. 11 (11th Cir. 1997); *Batey v. Stone,* 24 F.3d 1330, 1333-34 (11th Cir. 1994); *Hill v. Seaboard Coast Line Ry. Co.*, 885 F.2d 804, 808 (11th Cir. 1989); *Wu v. Thomas*, 847 F.2d 1480, 1483-84 (11th Cir. 1988); *Perryman v. Johnson Prods. Co,* 698 F.2d 1138, 1142(11th Cir. 1983); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982).

Douglas, 411 U.S. 792, 93 S. Ct. 1817; *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996). The Eleventh Circuit even expressly acknowledged that it was rejecting the principle that the *McDonnell Douglas* prima facie case model may be altered to the facts of the case: "[A]lthough the Court in *McDonnell Douglas* noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, *see McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S. Ct. at 1824 n.13, we believe that it is *generally unwise to fragment the applicable legal standards in this area*." *IMPACT II,* 158 F.3d at 1185 (emphasis added).

In *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. 1817, the Supreme Court established an allocation of the burden of production and an order for the presentation of proof in Title VII discrimination cases. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 2746 (1993). The Supreme Court in *McDonnell Douglas*, held that a plaintiff *may* establish a prima facie case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open *and the employer continued to seek applicants from persons of complainant's qualifications*." *Id.* at 802, 93 S. Ct. at 1824 (emphasis added). Once the plaintiff meets this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Id.* When the plaintiff and the employer satisfy their burdens, the plaintiff must show that the employer's reasons are a pretext. *Id.* at 804, 93 S. Ct. at 1825. At all times, the plaintiff retains the burden of persuasion and must

persuade the court that he is the victim of intentional discrimination. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. The purpose of the prima facie case is to create a rebuttable legal presumption of discrimination. However, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination in order to establish a "legally mandatory, rebuttable presumption.'" *O'Connor*, 517 U.S. at 311-12, 116 S. Ct. at 1310.

By holding that the prima facie standard can never include the relative qualifications as a necessary element, this Court's opinion runs contrary to *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. 1817 and case law applying the *McDonnell Douglas* criteria. For instance, in *Burdine,* the Supreme Court cited to the *McDonnell Douglas* prima facie case model in holding that the plaintiff had established a prima facie case by showing that she was qualified, she sought an available position, the position was left open for several months before she was rejected in favor of a male and that the successful male applicant had been under her supervision - in other words, the male did not have the plaintiff's qualifications. 450 U.S. at n. 6. *Accord O'Connor,* 517 U.S. at 310, 116 S. Ct. at 1309 (reiterating the *McDonnell Douglas* prima facie case standard); *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 986, 108 S. Ct. 2777, 2784 (1988) (holding a prima facie case under *Burdine* is established by showing that the employer "continued to seek applicants with qualifications similar to the plaintiff's").

The Eleventh Circuit incorrectly disregards this Court's *McDonnell Douglas* and *O'Connor* decisions, and instead opts to apply its own mechanical formula for every single promotional or hiring case. In *McDonnell Douglas*, and in subsequent Supreme Court decisions, the Court has made it quite clear that

the prima facie case may be altered to adjust to different factual situations for the particular case at hand. *McDonnell Douglas*, 411 U.S. at n. 13, 93 S. Ct. at n. 13; *Burdine*, 450 U.S. at n.6, 101 S. Ct. at n. 6 (the prima facie standard is "not inflexible" and the facts will vary in Title VII cases); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (prima facie case is not rigid, or ritualistic; rather it is a sensible way to evaluate the question of discrimination); *O'Connor*, 517 U.S. at 310, 116 S. Ct. at 1308; *United States Postal Service Bd. Of Governors, v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983) (the prima facie case method set forth in *McDonnell Douglas* was not intended to "be rigid, mechanized, or ritualistic"). In fact, the prima facie case method is merely a "`sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *Id.* (quoting *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949 (1978)).

Applying these principles, this Court in *O'Connor*, rejected the formalistic prima facie standard for an age discrimination claim used by the Fourth Circuit Court of Appeals, which required the plaintiff to establish that following his discharge, or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class. *Id.* at 310. Since the plaintiff's replacement was 40 years old - and therefore not outside of the protected class - the Fourth Circuit concluded that this element of the prima facie case was not satisfied. *Id.* This Court, in rejecting the Fourth Circuit's prima facie standard, held that the element of replacement by someone under 40 does not show a logical connection between each element of the prima facie case and the illegal discrimination. *Id.* at 312, 116 S. Ct. at 1310.

Similarly, the Eleventh Circuit has erred by adopting the formalistic method of establishing a prima facie case in the promotion or hiring context without considering that comparable qualifications in a particular case would show a more logical connection to an inference of discrimination than the elements adopted by the Eleventh Circuit. In fact, using the prima facie elements adopted in the *IMPACT II* decision would not necessarily suffice in all circumstances. For example, if the employer has a predominantly Black work force, the rejection of a Black applicant would not necessarily rise to an inference of discrimination. Thus, applying clear Supreme Court precedent, the *IMPACT II* court erred by not allowing for the flexible burden shifting standard mandated by this Court in *McDonnell Douglas, Burdine* and *O'Connor.*

The Eleventh Circuit also misread this Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1988) as support for its conclusion that a plaintiff can never be required to show that the plaintiff was equally or more qualified than the successful applicant at the prima facie stage of the *McDonnell Douglas* analysis. *IMPACT II,* 158 F.3d at 1192. The decision in *Patterson* holds that a plaintiff must never be required to present any specific type of evidence to show pretext under the *McDonnell Douglas* model. 491 U.S. at 187, 109 S. Ct. at 2379. This Court's decision in *Patterson* does not stand for the proposition that proof of qualifications is always an incorrect factor of proof in the prima facie stage of the analysis.

The Eleventh Circuit opinion also unnecessarily lessens the prima facie burden in many cases by dispelling the rationale that the purpose of the prima facie case is to eliminate the most common nondiscriminatory reasons for the plaintiff's rejection. *Burdine*, 450 U.S. at 254, 101 S. Ct. 1094. In almost every

single case applying the Eleventh Circuit standard, the plaintiff can, and will, meet the prima facie case elements by simply showing that the plaintiff is in a protected group, applied for position, was qualified for the job for which the employer was seeking applicants; that the plaintiff was rejected; and that after the plaintiff's rejection, the employer either continued to seek applicants or filled the position with persons outside of plaintiff's protected class. In fact, the Eleventh Circuit even held that the plaintiff need not identify the successful applicant and need only show that the successful applicant is not in her protected class. *IMPACT II*, 158 F.3d at 1193. This standard substantially decreases the plaintiff's burden of production, which is to establish "`a legally mandatory, rebuttable presumption'" of intentional discrimination. *See O'Connor*, 517 U.S. at 311-12, 116 S. Ct. at 1310 (quoting *Burdine*, 450 U.S. at 254, n. 7, 101 S. Ct. at 1094, n. 7). The purpose of a prima facie case is to support a reasonable inference of discrimination; however, by creating a formalistic and extremely light burden of production for all cases of discrimination, the *IMPACT II* decision dispels with this goal.

In sum, the Eleventh Circuit has disregarded the prima facie elements set forth in *McDonnell Douglas*, as well as the admonition that the prima facie criteria are to be adjusted based upon the different factual situations before the court. *See O'Connor*, 517 U.S. at 312, 116 S. Ct. at 1310; *Aikens*, 460 U.S. at 715, 103 S. Ct. at 1482; *Burdine*, 450 U.S. at n. 6, 101 S. Ct. at n. 6. The Eleventh Circuit has improperly created a bright line formula for every Title VII promotion or hire case, which conflicts with established Supreme Court precedent and supports the granting of this petition for certiorari.

B. The Eleventh Circuit's Opinion Is in Conflict with Other United States Courts of Appeal Decisions on Whether as Part of the Prima Facie Case the Plaintiff May Be Required to Show That the Plaintiff Was as Qualified, or More Qualified, than the Successful Applicant

The Eleventh Circuit opinion in *IMPACT II* conflicts with case law from other circuit courts of appeal, which hold that comparable qualifications is a proper element for the prima facie case elements. *E.g., Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 327-28 (1st Cir. 1996); *Carney v. Textron Auto. Co.*, 1998 WL 598722 (6th Cir. 1998); *Pafford v. Herman*, 148 F.3d 658 (7th Cir. 1998); *McCullough v. Real Foods, Inc.*, 140 F.3d 1124 (8th Cir. 1998); *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145 (9th Cir. 1997). Thus, this Court's guidance is needed with regard to the proper standard to be applied for Title VII discrimination claims based upon the failure to promote, or to hire.

In *Lehman*, the First Circuit held that the proper criteria for the alleged discriminatory failure to promote based upon the plaintiff's age required the plaintiff to show by a preponderance of the evidence that the employer sought to fill the position by hiring a younger individual with qualifications similar to those of the plaintiff. *Lehman*, 74 F.3d at 327-28. Similarly, the Sixth Circuit has held, in failure to promote context, that the fourth prong of the prima facie case requires the plaintiff to show "that the position was filled by a person *of comparable (or lesser) qualifications*." *Carney v. Textron Auto. Co.*, 165 F.3d 26, 1998 WL 598722 at *3 (6th Cir., Aug. 27, 1998) (emphasis added) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824); *Richmond v. Johnson*, 134 F.3d 372, 1997 WL 809962 at *2 (6th Cir., Dec. 18, 1997) (the fourth prong of the prima face case

requires the plaintiff to show that another employee with similar qualifications, who was not a member of the protected group, received the promotion).

The Fourth, Seventh, Eighth and Ninth Circuits are also in accordance with the First and Sixth Circuits by requiring plaintiffs to produce evidence of comparable qualifications at the prima facie case phase of the *McDonnell Douglas* analysis. For example, the Fourth Circuit holds that to establish a prima facie case for discriminatory discharge under the Age Discrimination in Employment Act the plaintiff must show, among other factors, that following the plaintiff's discharge the plaintiff was replaced by someone with comparable qualifications outside of the protected class. *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). In *Wade v. Norfolk Southern Corp.*, 121 F.3d 702, 1997 WL 526018 (4th Cir. 1997) the Fourth Circuit held that to establish a prima facie case of discrimination for failure to promote the plaintiff must show that she was denied promotion under circumstances which created an inference of unlawful discrimination. *Id.* at *3. The Fourth Circuit recognized that since the employer is allowed to choose among equally qualified candidates, the burden is on the plaintiff to show "she was more qualified than those chosen for the position." *Id.* Given that the employer chose the better qualified candidates (and that the plaintiff failed to show she was qualified for the positions), the court concluded that there was no inference of discrimination to support a prima facie case. *Id.*

In *Pafford v. Herman*, 148 F.3d 658, 669 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 548 (1998), the Seventh Circuit held one of the elements that the plaintiff must show to demonstrate a prima facie case for a failure to promote claim is that "those who were promoted had similar or lesser qualifications for the

position, or other evidence from which one can infer that the plaintiff was denied promotion for a discriminatory reason". *Id.* at 670. The court in *Pafford* held that the plaintiff failed to establish a prima facie case as she did not establish that she was qualified and that she was "as qualified or more qualified than the four Caucasian employees who were promoted." *Id.* Similarly, the Eighth Circuit holds that comparable qualifications is a proper element for the prima facie proof in a failure to promote context. *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1126 -27 (8th Cir. 1998) (fourth prong of prima facie requires plaintiff to demonstrate "her employer promoted a person of similar qualifications who was not a member of the protected group"); *accord Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612 (8th Cir. 1998) (same). Finally, the Ninth Circuit holds that to establish a prima facie case the plaintiff, as part of the prima facie, case must show that "after her rejection, the position remained open and the employer continued to seek applications from persons with comparable qualifications." *Cordova v. State Farm Ins. Companies,* 124 F.3d 1145, 1148 (9th Cir. 1997); *see Tarin v. County of Los Angeles*, 123 F.3d 1259, n. 3 (9th Cir. 1997).

The Eleventh Circuit's decision in *IMPACT II* conflicts with the First, Fourth, Sixth, Seventh, Eighth and Ninth Circuits by holding that to create a prima facie case of discrimination based upon the failure to promote or to hire, the court may never require the plaintiff to show that he was equally or more qualified than the successful applicant. It is important for this Court to resolve this conflict as the Eleventh Circuit has created a lighter burden for plaintiffs in meeting the prima facie case requirements of the *McDonnell Douglas* framework, while other circuit courts of appeal have followed the line of authorities from *McDonnell Douglas*, which hold that comparable qualifications may, if

logically connected to the claim of discrimination, be an element that the plaintiff must satisfy at the prima facie stage in a Title VII case. This clear conflict among the circuit courts of appeal, provides sufficient basis for the granting of this Petition for Certiorari.

II. THE ELEVENTH CIRCUIT'S REQUIREMENT THAT THE EMPLOYER MUST PRESENT EVIDENCE FROM THE DECISION-MAKER IN ORDER TO SATISFY ITS BURDEN OF PRODUCTION AND THAT IN THE ABSENCE OF THIS TESTIMONY, JUDGMENT MUST BE ENTERED IN FAVOR OF THE PLAINTIFF UPON THE ESTABLISHMENT OF A PRIMA FACIE CASE, MISAPPLIES THE EMPLOYER'S BURDEN.

The burden of persuasion at all times remains with the plaintiff in a Title VII discrimination case. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. The defendant is only required to simply explain what he has done or to produce evidence of a legitimate nondiscriminatory reason. *Id.* (citation omitted). In *Burdine*, this Court reversed the Fifth Circuit on the basis that by requiring the defendant to provide evidence in order to meet its burden of production that those hired were better qualified than the plaintiff, was to improperly place the burden of persuasion on the defendant. *Id.* at 257, 101 S. Ct. at 1095-96. Similar to *Burdine*, the *IMPACT I* and *II* decisions also have misplaced the burden of persuasion on the employer.

In this case, the Eleventh Circuit has misconstrued the *McDonnell Douglas* burden shifting framework by requiring the employer to submit a specific type of evidence in order to rebut the plaintiffs' prima facie case. In other words, the Eleventh Circuit has dictated the type of evidence employers in an

employment discrimination action must present in order to meet their burden of production. *IMPACT I*, 893 F.2d at 1200. The Eleventh Circuit requires that the employer must offer proof by the person who made the employment decision, or by any other person stating that the employment decision was made on the basis of what he thought demonstrated the best qualified person. *Id.* at 1194. Petitioners are, in the Eleventh Circuit, cloaked with the burden of persuasion that was rejected in *Burdine*, 450 U.S. at 256-57, 101 S. Ct. 1097 and in *St. Mary's*, 509 U.S. at 509, 113 S. Ct. at 2748 ("By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners [defendants] sustained their burden of production").

The employer should never be required to persuade the court that it had convincing objective reasons for preferring the chosen applicant above the plaintiff. *See Burdine*, 450 U.S. at 257, 101 S. Ct. at 1096. The Eleventh Circuit has applied the burden of persuasion to the Petitioners, which is improper as recognized by *Burdine*.

Furthermore, the Eleventh Circuit has held that the Petitioners, by not presenting specific testimony by the decision-maker, are in the same position as if they were silent (even though they presented six days of testimony and evidence) when faced with the Plaintiffs' proof. The Eleventh Circuit's reasoning was discredited by this Court in *St. Mary's* where this Court stated that:

> By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a `better position than if they had remained silent.'

509 U.S. at 509, 113 S. Ct. at 2748. Thus, the petition for certiorari should be granted, as an employer that presents evidence that is ultimately rejected by the factfinder should not be placed in the same position as if the employer is silent.

Based upon the decision in *IMPACT I* that the Petitioners did not meet their burden under *Burdine*, the Eleventh Circuit has ordered on remand that the District Court enter judgment for the Plaintiffs if the District Court determines that the Plaintiffs have satisfied their burden of proof in presenting a prima facie case. *IMPACT II*, 158 F.3d at n. 31. In reaching this conclusion, the court held that Petitioners, by not meeting their burden of production, were the same as if they were silent in the face of the presumption created by the prima facie case. *See id.* This result is not warranted under *St. Mary's*, 509 U.S. 502, 113 S. Ct. 2742. In *St. Mary's* this Court held that the fact finder's rejection of an employer's asserted reason for its actions does not entitle the plaintiff to judgment. *See* 509 U.S. at 509-10, 113 S. Ct. at 2748.

Moreover, the Eleventh Circuit's decision misapplies the purpose of the *McDonnell Douglas* prima facie case requirement as a prima facie case satisfying the flexible standards under *McDonnell Douglas* should not guarantee the plaintiff a victory on the ultimate finding of discrimination. Courts of appeal in at least three circuits have noted that evidence, by itself, "required to establish a prima facie case under *McDonnell Douglas* is not invariably sufficient to sustain an ultimate finding of illegal discrimination." *Fisher v. Vassar College,* 114 F.3d 1332, n. 7 (1997) (citing *Equal Employment Opportunity Comm'n, v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir 1997); *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) and *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). In *Avery*, the Sixth Circuit remarked that the amount of evidence in

the prima facie context is "not the same amount necessary to win a judgment." 104 F.3d at 861. Specifically, the prima facie stage only requires the plaintiff to present facts allowing inferences to be drawn in the plaintiff's favor, which is not the same evidence to establish pretext. *Id.*

The Eleventh Circuit has misconstrued *St. Mary's* and *McDonnell Douglas* by conflating the prima facie burden with the ultimate issue of racially-motived action in this case. Thus, this Court should resolve the conflict created by the *IMPACT II* decision with Supreme Court precedent.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Richard M. Dunn
Counsel of Record
Mitchell E. Widom
Sherril M. Colombo
Bilzin Sumberg Dunn
Price & Axelrod LLP
Attorneys for Petitioners
2500 First Union Financial Center
Miami, Florida 33131
(305) 374-7580

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 28, 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-2898

D.C. Docket No. 79-895/MMP

DIANN WALKER, CHARLES STEWART, DOROTHY ROBERTS, BARBARA KING, PEARLIE WILLIAMS, LOUVENIA JONES, ROSA HENDERSON, DELORES COLSTON,

Plaintiffs-Appellants

versus

SANDRA MORTHAM, SECRETARY OF STATE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(October 28, 1998)
Before TJOFLAT, DUBINA and CARNES, Circuit Judges.

Appendix A

TJOFLAT, Circuit Judge:

Black employees and applicants for employment with the State of Florida brought suit against the State and its Secretary of State under 42 U.S.C. §§ 2000e et seq. (Title VII),[1] claiming that the State had engaged in a pattern and practice of unlawful racial discrimination in its employment decisions. The case was certified as a class action, but then decertified for inadequacy of representation. After a non-jury trial on the merits of the individual plaintiffs' claims, the district court entered final judgment in favor of the defendants on all counts, assuming that every plaintiff had proven a prima facie case of discrimination, but finding that none of the plaintiffs had carried the ultimate burden of proving discrimination in light of the defendants' asserted nondiscriminatory reasons for the challenged employment decisions. Plaintiffs then appealed to this court. We reversed and remanded, holding that the defendants had not articulated a legitimate, nondiscriminatory reason for any of their challenged employment decisions, and therefore directing the district court to determine for each claim

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[1] The plaintiffs' original complaint was brought under 42 U.S.C. § 1981 (1994), and 42 U.S.C. § 1983 (1994). The district court promptly dismissed all claims against the State of Florida brought under those two statutes, but denied the Secretary of State's motion to dismiss him as well. In their first amended complaint, the plaintiffs added claims under Title VII that paralleled their claims under § 1981 and § 1983, and named the State of Florida as a Title VII defendant. The parties then ceased to distinguish among the three statutes. After examining the record, we conclude that only Title VII claims remain in this case. The district court on remand should proceed only under that statute.

whether the plaintiff had established a prima facie case of discrimination. See Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc. (IMPACT) v. Firestone, 893 F.2d 1189 (11th Cir. 1990) ("IMPACT"). On remand, the district court held that none of the plaintiffs had established a prima facie case with respect to any claim, and again entered judgment in favor of the defendants on all counts.

Plaintiffs now appeal the district court's judgment on remand, claiming that the district court failed to comply with this court's mandate and with the law of the case. Because we conclude that the district court applied incorrect legal standards in deciding whether the plaintiffs had established prima facie cases, we undertake the task ourselves.[2] We vacate the court's

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[2] In determining whether a plaintiff established a prima facie case with respect to a given claim, the district court's task was to examine the evidence the plaintiff adduced at trial and determine whether the plaintiff had presented credible evidence in support of the four elements of a prima facie case established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973): 1) she is a member of a protected class under Title VII; 2) she was qualified for the employment position in question; 3) she applied for the employment position in question and was rejected; and 4) the employment position remained open or was filled by a person outside the protected class to which the plaintiff belongs. See Id., 411 U.S. at 802, 93 S.Ct. at 1824; see also part II.A, infra. Inasmuch as this task only required the district court to examine a cold record for the existence of evidence in support of the elements, we are equally suited to undertake the same task on appeal. We must still remand, however, so that the district court, as trier of fact, can determine whether the evidence supporting the prima facie case is credible.

judgment in part and affirm in part, remanding the case to the district court with directions.

I.

This case was brought in 1979 as a class action in the District Court for the Northern District of Florida. The named plaintiffs - a non-profit organization ("IMPACT"),[3] black employees of Florida's Department of State (the "Department"), and black former applicants for employment with the Department - brought suit on behalf of "all past, present, and potential black employees" against the State and the then-Secretary of State, George Firestone,[4] alleging racial

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[3] The full name of the organization was Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc.; its membership consisted only of individual plaintiffs in this case. On January 21, 1986, the district court dismissed IMPACT from the case for lack of standing. The plaintiffs appealed that dismissal in IMPACT, 893 F2d 1189, and we implicitly affirmed the district court's decision. See IMPACT, 893 F.2d at 1192 (listing other issues on appeal and stating that "[t]hese are the only claims we think merit attention on appeal).

[4] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, George Firestone's successor, Jim Smith, was substituted as a party defendant for Firestone when Firestone left office. When Smith finished his term as Secretary of State, his successor Sandra Mortham (the current Secretary) was substituted for Smith.

discrimination in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VII.[5] The plaintiffs claimed that the State had engaged in a pattern and practice of employment discrimination, carried out by a cadre of white supervisors who conducted discriminatory subjective evaluations. The plaintiffs sought equitable relief, including reinstatement, hiring, back pay, front pay, seniority compensation, and fees and costs.

On November 7, 1980, the district court entered an order, pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying a class in the case consisting of "all past, present and future black persons employed by the Florida Department of State and all past, present and future black applicants for employment with the Florida Department of State." The case then proceeded as a certified class action. Following protracted discovery disputes, the plaintiffs filed an "emergency motion " to suspend the pre-trial schedule. In that motion, the plaintiffs stated that, because the defendants had repeatedly refused to comply with the plaintiffs' discovery requests, plaintiffs' counsel would be "financially and physically unable to adequately represent the interests of the certified class" if the court did not grant plaintiffs immediate relief from the defendants' recalcitrance. Based on the quoted representation by the plaintiffs, the district court held a hearing regarding the continued ability of the named plaintiffs and of plaintiffs' counsel adequately to represent the class under Rule

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[5] See note 1, supra.

23(a)(4). Following the hearing, the court decertified the class based on financial inability.

The case then proceeded toward trial on the individual plaintiffs' claims. The court entered numerous pretrial orders, including an order stating that "defendants need not include [in their discoverable evidence] any information concerning employment tests; such tests are not an issue in this case."

Non-jury trial commenced April 1, 1986. At trial, the court heard the claims of eleven individual plaintiffs,[6] each

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[6] These eleven were Diann Walker, Charles Stewart, Dorothy Roberts, Barbara King, Pearl Williams, Louvenia Jones, Rosa Henderson, Delores Colston, Linda Isaac, Jacquelyn Ross, and Gracie Holton. Isaac and Ross were not originally named as plaintiffs in the suit; they moved to intervene under Rule 24(b) of the Federal Rules of Civil Procedure on December 17, 1984. The court granted their motion on June 7, 1985.

Two additional plaintiffs, Clifford Simmons and Marguerite Stewart, were included in all pretrial motions but did not testify at trial. Towards the end of the plaintiffs' case in chief, Stewart and the defendants settled, and the parties stipulated to a voluntary dismissal of all her claims. At the close of the plaintiffs' case in chief, the plaintiffs renewed their pre-trial motion to sever Simmons' claims from the rest of the suit, which the court granted. After trial, the parties stipulated to a dismissal, and the district court dismissed Simmons' claims with prejudice on September 17, 1986. Neither Simmons nor Stewart joins this appeal.

alleging racial discrimination in hiring or promotion and proceeding on both disparate treatment and disparate impact theories. At the close of the plaintiffs' case in chief, the court, in response to oral motions by defendants' counsel, 1) dismissed all disparate impact claims, 2) dismissed all claims brought by plaintiff Gracie Holton, and 3) dismissed plaintiff Charles Stewart's claim based on the Department's failure to hire him to the position of Regional Representative.[7]

On August 11, 1986, the district court entered an order detailing its findings of fact and conclusions of law regarding the evidence presented at trial. The court assumed that each plaintiff had established a prima facie case of discrimination, but found that the defendants had produced evidence of legitimate, nondiscriminatory reasons for the employment

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[7] Before trial, the court had held that certain positions within the Department were exempt from coverage under Title VII. At the close of the plaintiffs' case in chief, the court found that Regional Representative was one of those exempt positions, and therefore held that Stewart could not bring a claim under Title VII for failure to hire a Regional Representative position. Steward moved for reconsideration of the court's decision during the defendants' case in chief, and the court reaffirmed its dismissal. Thus, although the district court's dispositive order of August 11, 1986, purports to pass judgment on Stewart's Regional Representative claim, that claim was no longer properly before the court. Stewart does not appeal the court's earlier order dismissing the Regional Representative claim; we therefore do not address that claim in this opinion.

decisions challenged by the plaintiffs, and that the plaintiffs had failed to show they had been discriminated against despite that evidence. It therefore entered judgment for the defendants on all counts on October 3, 1986.

The plaintiffs appealed to this court, claiming, inter alia that the court had erred by 1) eliminating testing evidence from the scope of discovery; 2) dismissing plaintiff Gracie Holton's claims; 3) decertifying the class and denying the plaintiffs' motion to recertify; and (most importantly for the purposes of the present appeal) 4) determining that defendants had carried their burden of production under Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). With regard to the last issue, the plaintiffs argued that the defendants themselves had articulated no legitimate, nondiscriminatory reasons for their employment decisions, and that the court had impermissibly substituted its own reasons as support for its judgment against the plaintiffs. We issued an opinion addressing the plaintiffs' claims on February 6, 1990. See IMPACT, 893 F.2d 1189.

In IMPACT, we held, in relevant part, that the defendants indeed had failed to carry their burden under Burdine, see IMPACT, 893 F.2d at 1193-94;[8] thus, we

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[8] Our precedent requires that if a defendant raises as its legitimate, nondiscriminatory reason relative qualifications of the applicants, the defendant "must include the fact that the decision-maker knew that the promoted individual's qualifications were superior at the time the decision was made." Hill v. Seaboard Coast Line R.R. Co., 767 F.2d 771, 774 (11th Cir. 1985); see also Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061-62 (11th Cir. 1994)

concluded that the district court had erred in its judgment with regard to all claims. We therefore reversed and remanded with directions that the district court make specific findings with

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(holding that an articulated reason based on after-acquired evidence does not meet the defendant's burden of production under Burdine). The defendant cannot testify in abstract terms as to what might have motivated the decision-maker; it must present specific evidence regarding the decision-maker's actual motivations with regard to each challenged employment decision. See IMPACT, 893 F.2d at 1193-94. Likewise, a court may not assume, based on its own perusal of the record, that the decision-maker in a particular case was motivated by a legitimate reason when the defendant has offered none. See IMPACT, 893 F.2d at 1193-94; cf. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 775 (11th Cir. 1982) (rejecting on appeal the legitimate nondiscriminatory reasons "assigned by the court" because they were "not [reasons] articulated by [the decision-makers] when they were questioned"); Eastland v. Tennessee Valley Authority, 794 F.2d 613, 626 (11th Cir. 1983) (holding that the district court erred in finding that relative qualifications were a sufficient legitimate, nondiscriminatory reason when there was no evidence that the decision-maker knew of the applicants' relative qualifications when he made the adverse employment decision).

We determined in IMPACT that the defendants had failed to present any probative evidence at trial regarding the motivations of the decision-maker with regard to any of the plaintiffs' claims. See IMPACT, 893 F.2d at 1194 ("In this case, the defendants offered no evidence explaining any employment decision."). Although a State official testified that the Department of State hired only the best-qualified individuals for State jobs, the defendants presented no evidence regarding the particular decisions challenged by the plaintiffs. Thus, we held that the defendant failed to carry its burden of production under Burdine, explained in part III.A, infra. See IMPACT, 893 F.2d at 1193-94.

regard to the prima facie strength of each plaintiffs claim. See id. at 1194-95. We also held in IMPACT that the district court had erred in precluding pretrial discovery of employment testing evidence, and that the district court had incorrectly dismissed plaintiff Holton's claims at trial. See id. at 1196-97. Finally, we stated that the issue of recertification would "remain open for consideration by the trial court on remand." Id. at 1196.

On remand, the district court stated that each plaintiff seeking to establish a prima facie was required to prove the following four elements:

1) The plaintiff was a member of a protected class;
2) The plaintiff applied for and was qualified for the position in question;
3) A person not a member of the protected class with equal or lesser qualifications received the position, and;
4) The adverse employment action complained of was actually taken against him.

The court concluded that none of the plaintiffs had succeeded in establishing a prima facie case under these criteria with respect to any of their claims; therefore, no plaintiff was entitled to judgment in his or her favor. The court then concluded that, because no plaintiff had succeeded on his or her individual claim, the issue of recertification was moot. Finally, the court held that because there existed no certified class, and because it had dismissed all disparate impact claims before trial, employment testing evidence was irrelevant. Having disposed of all issues included in our IMPACT mandate, the

district court entered judgment, on May 22, 1995, against every plaintiff save Gracie Holton (now named Gracie Dejerinette).[9]

The plaintiffs now appeal that judgment, claiming that the district court erred on remand in 1) finding that none of the plaintiffs had established a prima facie case of discrimination at trial, 2) refusing to allow plaintiffs to pursue their claims concerning employment tests, and 3) refusing to recertify the class. We consider these claims in turn.

In part II.A, we conclude that the district court misapplied the law when evaluating the prima facie strength of most of the plaintiffs' claims; thus, we hold that the court erred in entering judgment for the defendants on those claims. We then look to the record ourselves to determine whether any of the erroneously-decided claims were supported by evidence at trial that, if believed by the district court as the trier of fact, would suffice to establish a prima facie case of discrimination in violation of Title VII. In part II.A.2, we vacate the court's judgment with respect to those claims for which the plaintiff established a prima facie case and remand for further

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[9] The court stated that it would hold an evidentiary hearing on Gracie Dejerinette (neé Holton)'s claims. Thus, because the court did direct that the judgment be entered as a "final judgment" under Federal Rule of Civil Procedure 54(b), we had no jurisdiction to review the judgment under 28 U.S.C. § 1291 (1994). See Fed.R.Civ.P. 54(b). On July 19, 1995, however, Dejerinette gave notice of a settlement with the defendants and voluntary dismissed of all her claims. Her voluntary dismissal converted the district court's judgment into a final judgment and cleared the way under § 1291 for this appeal.

proceedings. In part II.A.3, we affirm the court's judgment with regard to all other claims.

As we explain in part II.B, because we hold in part II.A that the plaintiffs' prima facie cases are determinative, we need not reach the plaintiffs' arguments regarding admissibility of testing evidence. With regard to the plaintiffs' third issue - recertification - we again leave the matter open for the district court on remand.

II.

A.

Appellants first claim that the district court erred in assessing the prima facie strength of their claims. Before addressing their argument, we pause to set forth the now-familiar framework of burdens of proof, established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1981), that a Title VII plaintiff must satisfy to obtain judgment in her favor if she possesses only circumstantial evidence of discrimination.

Under McDonnell Douglas, a Title VII plaintiff must first establish a prima facie case of intentional discrimination. See McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. A valid prima facie case creates a presumption that discrimination has occurred.[10] See Burdine, 450 U.S at 254 n.7,

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[10] We note that the prima facie case establishes a presumption, and not an inference, of intentional discrimination. An inference is "[a] process of reasoning by which a fact or proposition

sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." Black's Law Dictionary 778 (6th ed. 1990). For instance, in a murder case, if the prosecution can establish that the victim was alive when the defendant entered his home, that the victim and the defendant were the only people in the house, that the defendant was carrying a pistol, that neighbors heard a gunshot while the defendant was in the victim's home, and that the victim was dead when the defendant left his home, then a jury could reasonably infer that the defendant murdered the victim, even though no one testified to seeing the murder take place. In contrast, in an employment discrimination case, if the plaintiff can establish the elements of the prima facie case - e.g., that she is female, that she applied for a position with the defendant employer, that she was qualified for the position, and that the position was given to a male - it does not logically follow that the employer discriminated against the plaintiff on the basis of her sex. The prima facie case, standing alone, puts the evidence in equipoise - although one could reasonably conclude that the plaintiff was not hired because of her sex, one could just as reasonably conclude that the plaintiff was not hired because the employer did not like the suit she was wearing, or because the employer's son was also an applicant, or because another applicant agreed to work for half the posted salary, or any number of reasons other than sex discrimination. A fact finder cannot infer intentional discrimination from the prima facie case.

The prima facie case does, however, create a presumption of intentional discrimination. See Burdine, 450 U.S. at 254 & n.7, 101 S.Ct. at 1094 & n.7. A presumption is "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established." Black's Law Dictionary 1185 (6th ed.1990). A presumption does not follow logically from the facts establishing the presumption, but (in the case of a non-conclusive presumption) acts as a procedural device to force the party against

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whom the presumption operates to come forward with rebuttal evidence. See Robert Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1222 (1981). The presumption of intentional discrimination in employment discrimination cases forces the employer - who is in the best position among the parties to know why certain employment decisions were made - to present evidence regarding why the plaintiff was not given the desired position.

The importance of the inference/presumption distinction is in the burden placed on the defendant at the McDonnell Douglas rebuttal stage. If establishment of the prima facie case created an inference of intentional discrimination, the defendant's legitimate, non-discriminatory explanation would be an affirmative defense. Cf. NLRB v. McClain of Ga., Inc., 138 F.3d 1418, 1424 (11th Cir. 1998) (holding in a National Labor Relations Act case that a showing that an employee's involvement in union activity was a motivating factor in the discharge of that employee creates an inference of anti-union animus; the employer can then raise the claim that the employee would have been discharged even had he not engaged in union activity as an affirmative defense). The defendant would therefore carry the burden of persuasion in regard to that explanation. See Mulhall v. Advance Security, Inc, 19 F.3d 586, 592 n.12 (11th Cir. 1994). Because establishment of the prima facie case creates only a presumption of intentional discrimination, however, the defendant carries only the burden of production in regard to his legitimate, non-discriminatory explanation. See id.; see also Fed. R. Evid. 301 (1998) (noting that presumptions create a burden of production on the party against whom the presumption is directed, but not a burden of persuasion); Black's Law Dictionary 1185 (6th ed. 1990) (same). The burden is then on the plaintiff to prove that the proffered explanation is pretextual.

In many cases, this will be a distinction without a difference. For instance, if the plaintiff establishes a prima facie case of

101 S. Ct. at 1094 n.7; Combs v. Plantation Patterns, 106 F.3d at 1519, 1528 (11th Cir.1997), cert. denied sub nom. Combs v. Meadowcraft Co., - U.S.-, -, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998); Crawford v. Western Elec. Co., 745 F.2d 1373, 1376 (11th Cir. 1984). If the prima facie case remains unrebutted,

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intentional discrimination and the defendant fails to produce any evidence impeaching that prima facie case or rebutting it with a legitimate, non-discriminatory reason for the employment decision, then the plaintiff prevails as a matter of law - regardless of whether the prima facie case is classified as a "presumption" or an "inference." See Combs v. Plantation Patterns, 106 F.3d 1519,1528 (11th Cir. 1997), cert. denied sub nom. Combs v. Meadowcraft Co, - U.S. -, -, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998); Thompkins v. Morris Brown College, 752 F.2d 558, 562 (11th Cir. 1985). In such a case the defendant has met neither the burden of production nor the burden of persuasion. There are, however, situations in which the distinction is important. We therefore feel the need to clarify this point, especially in light of dicta in a few Eleventh Circuit cases that illustrate confusion on the issue. See Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1310 (11th, Cir. 1998), superseded in part,- F.3d -(11th Cir. 1998) (slip op. 97-6076, Aug. 24, 1998); Green v. School Bd. of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994).

The special concurrence argues that this distinction is needlessly complex and confusing. We, however, feel that the distinction is fairly simple, and that it is instead the dicta in the case law that is needlessly complex and confusing. As for the special concurrence's argument that the distinction is incorrect as applied to the McDonnell Douglas prima facie case, we note only that we have considered the points it raises and nevertheless stand by what we have written.

therefore, the plaintiff is entitled to judgment in her favor as a matter of law, provided that the trier of fact believes the evidence put forward to establish the prima facie case.[11] See Combs, 106 F.3d at 1528 ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." (emphasis added) (citing Burdine, 450 U.S. at 254, 101 S.Ct. at 1094).

The defendant may rebut a prima facie case of intentional discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment decision of which the plaintiff complains. Although the burden is not "onerous", Burdine, 450 U.S. at 253, 101 S.Ct. at 1094, neither is it a mere formality. The defendant may not satisfy its burden by presenting a hypothetical reason for the employment decision in question; instead, it must raise "a genuine issue of fact as to whether it discriminated against the plaintiff; instead, it must raise a genuine issue of fact as to whether it discriminated against the plaintiff" by making that decision. Id. at 255, 101 S.Ct. at 1094. In other words, "the defendant must clearly set forth, through the introduction of admissible evidence," the reason for its adverse employment decision, and that reason "must be legally sufficient to justify a judgment for the defendant." Id.; see also Trotter v. Board of Trustees of the Univ of Ala., 91 F.3d 1449, 1455 (11th Cir. 1996).

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[11] The only evidence in the prima facie case that is likely to be in dispute is the plaintiff's qualifications - the plaintiff's sex, the existence of a job opening, and the sex of the person placed in that opening tend to be undisputed.

Once the defendant carries this burden and thereby rebuts the plaintiff's prima facie case, the initial presumption of intentionally discrimination drops from the case. See Carter v. Three Springs Residential Treatment, 132 F.3d 635, 643 (11th Cir. 1998) ("Successfully carrying this burden bursts the presumption of discrimination and leaves only the ultimate question - whether the employer's offered explanations are pretextual."). The plaintiff must then persuade the trier of fact that the defendant intentionally discriminated against her despite the defendant's assertion of a lawful reason for the challenged employment decision. See Burdine, 450 U.S. at 255, 101 S.Ct. at 1094-95; Combs, 106 F.3d at 1528 (citing McDonnell Douglas) The plaintiff cannot simply stand on her prima facie case;[12] instead, she must convince the court that the evidence in the case as a whole preponderates in favor of a

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[12] This is because a factfinder cannot infer intentional discrimination solely from establishment of the prima facie case. See supra note 10. We note, however, that the same evidence that is used to establish the prima facie case may also cast doubt on the employer's proffered legitimate, non-discriminatory basis for its decision. Thus, in some cases, the plaintiff, in order to prove intentional discrimination, will not need to produce any more evidence that what was required to establish the prima facie case. See Arrington v. Cobb County, 139 F.3d 865, 875 n.20 (11th Cir. 1998)("A plaintiff may rely on the same evidence both to establish her prima facie case and to cast doubt on the defendant's non-discriminatory explanations."); Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 921 (11th Cir. 1993)("In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case.")

finding of intentional discrimination by the defendant. If she does so, she is entitled to judgment in her favor.

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Keeping this framework in mind, we turn to our decision in IMPACT, which is the source of the district court's mandate on remand.[13] In IMPACT, we held that the defendants had failed to produce any probative evidence of legitimate, nondiscriminatory reasons for their challenged employment decisions. If any plaintiff had established evidence at trial sufficient to raise a presumption of intentional discrimination, therefore, that presumption stood at the end of trial and the plaintiff was entitled to judgment in her favor if she convinced the trier of fact of the credibility of her prima facie case. Because the district court had not made findings of fact with regard to the prima facie strength of each plaintiff's claim, we remanded the plaintiffs' cases to the district court for the necessary determinations. The court on remand found that no plaintiff had established a prima facie case. The plaintiffs now contend that the district court erred in that determination.

We agree in part with the appellants' contention. On remand, the district court applied two incorrect legal standards when assessing the prima facie strength of the plaintiffs' claims.

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[13] Under the law of the case doctrine, we are bound by the factual findings and legal conclusions of that decision. See Venn v. St. Paul Fire and Marine Ins. Co. 99 F.3d 1058, 1063 (11th Cir. 1996).

Any decision based on one or both of those standards, therefore, is in error.

First, the district court required each plaintiff to prove the following elements by a preponderance of the evidence:

1) The plaintiff was a member of a protected class;
2) The plaintiff applied for and was qualified for the position in question;
3) A person not a member of the protected class with equal or lesser qualifications received the position, and;
4) The adverse employment action complained of was actually taken against him.

In other words, the court required each plaintiff to prove that he or she was equally or more qualified than the successful applicant to hold each employment position in question. The plaintiffs claim that the court erred by including relative qualifications at the prima facie stage of the McDonnell Douglas framework. We agree.

In this circuit, we appear to have articulated different standards for a prima facie case depending on whether the relevant Title VII claim is classified as a "failure to hire" or a "failure to promote" claim.[14] There exist several different

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[14] Several plaintiffs in this case claim discrimination based on the Department's failure initially to hire them from outside the Department, while others base their claims on the Department's failure to promote them from within the Department to a position of greater responsibility and benefits. We believe, therefore, that this case presents both "types" of claims.

formulas for a "failure to promote" prima facie case, including a formula akin to that articulated by the district court. We note in passing that the promulgation of differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, but one which is exacerbated in Title VII jurisprudence because of the general instability that pervades this area of the law. Thus, although the Court in McDonnell Douglas noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, see McDonnell Douglas, 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13, we believe that it is generally unwise to fragment the applicable legal standards in this area. That said, we proceed to examine the district court's formulation of a prima facie case as including proof of relative qualifications.

In McDonnell Douglas, the Supreme Court stated that a plaintiff may establish a prima facie case for a Title VII claim by showing

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications, he was rejected; and
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824.[15] This standard, however, was tailored to the particular case at hand - a case in which there was no showing the defendant employer had hired anyone for the plaintiff's coveted position. See Green v. McDonnell-Douglas Corp., 299 F.Supp. 1100 (E.D.Mo. 1969) (reciting the facts of the case but including no mention of a successful applicant); Green v. McDonnell-Douglas Corp., 318 F.Supp. 846 (E.D.Mo. 1970) (sam).[16] In Crawford v. Western Elec. Co., 614 F2d 1300, 1315 (5th Cir. 1980),[17] therefore, we added an alternative to the fourth element of the McDonnell Douglas standard to address a situation in which the plaintiff "loses out" to another applicant in competition for the coveted promotion:

> [P]laintiffs may establish a prima facie violation by showing that they are members of a group

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[15] We note that this original formulation allows a plaintiff to establish her prima facie case without even showing that another person was hired for the job, let alone anything about the successful applicant.

[16] On appeal, the Eighth Circuit did not add any information regarding a possible successful applicant. See Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972). The court of appeals, however, noted both that the plaintiff was qualified for the job and that the employer was seeking workers of his qualifications. Id. at 339.

[17] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> protected by title VII, that they sought and were qualified for positions that [the defendant employer] was attempting to fill, that despite their qualifications they were rejected, and that after their rejection Western Electric either continued to attempt to fill the positions or in fact filled the positions with [persons outside the plaintiffs protected class].

(citing McDonnell Douglas) (emphasis added). This alternative was necessary because "the fourth McDonnell Douglas criterion, that the position remained open and that the employer continued to seek applicants after the plaintiff's rejection, certainly should not be required when the plaintiff's rejection is simultaneous with the hiring or promotion of the person chosen to fill the position." Simon v. Honeywell Inc., 642 F.2d 754, 755 n.4 (5th Cir. 1981) (citing Burdine, 450 U.S. at 254 n.6, 101 S.Ct. at 1094 n.6).

The Crawford standard is well established in this circuit. See e.g., Coutu v. Martin County Bd. of County Comms., 47 F.3d 1068,1073 (11th Cir. 1995); Welborn v. Reynolds Metal Co., 810 F.2d 1026, 1028 (11th Cir. 1987); see also Hill v. Seaboard Coast Line R.R. Co., 767 F.2d 771, 773 (11th Cir. 1985); McWilliams v. Escambia County Sch. Bd., 658 F.2d 326, 331 (5th Cir. Unit B 1981)[18] (cited in the district

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[18] In Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

court's original order of August 11, 1986).[19] In Perryman v. Johnson Prods. Co., 698 F.2d 1138 (11th Cir. 1983), however, we "created," in dicta,[20] a very different prima facie standard, stating that:

> A plaintiff may establish a prima facie case of promotion discrimination by proving that he or she is a member of a protected minority, was qualified for and applied for the promotion, was rejected despite these qualifications, and that other employees with equal or lesser qualifications who were not members of the protected minority were promoted. Crawford v. Western Electric Co., Inc., 614 F.2d 1300, 1315 (5th Cir. 1980); Bundy v. Jackson, 641 F.2d 934, 951 (C.A.D.C. 1981).

Perryman, 698 F.2d at 1142 n.7 (emphasis added). Clearly Crawford does not support the addition of a "relative

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[19] We recognize that when the plaintiff applies for a position for which there are a number of openings, it is often impossible to determine which successful applicant for the position actually got the "plaintiffs" berth for purposes of comparing class status. In such a situation, it is sufficient to identify any successful applicant for the position.

[20] The issue on appeal in Perryman was whether the defendant had successfully rebutted the plaintiffs' prima facie case, Perryman, 698 F.2d at 1141; thus, the elements of the prima facie case were not even in question and the formulation of the prima facie case is pure dicta.

qualifications" element to the fourth prong of the Crawford prima facie standard.[21] Although the second case Perryman cites as support, Bundy v. Jackson, may provide indirect

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[21] The context of the Perryman standard does, however, provide insight into why the Perryman court apparently mis-cited Crawford. In Perryman, a group of plaintiffs brought both individual and class claims against the defendant employer, Johnson Products, claiming that Johnson Products had violated Title VII by "discriminating against women in hiring, promotion, and termination practices." See Perryman 698 F.2d at 1140. The Perryman court, when reviewing the plaintiffs' claims en masse, stated that

> a prima facie case of discrimination in termination is established where the plaintiff proves by a preponderance of the evidence that he or she is a member of a protected class, was qualified for the position held, and was discharged and replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982).

Because the Perryman case dealt with claims other than claims based on discharge, however, the court then stated that "A similar burden has been imposed on plaintiffs seeking to establish a prima facie case of discrimination in promotion," id. at 1142, and proceeded to articulate the prima facie case standard quoted in the text. Apparently, the Perryman court overlooked the disjunctive nature of both the Crawford and the Lee prima facie standards; neither case supports an element of relative qualifications if the defendant employer has filled the plaintiff's position with a person outside the plaintiff's protected class.

support from outside the circuit,[22] we have found no explanation for why the court decided to alter the prima facie case in this way.

Since Perryman, we have several times included the "lesser or equal qualifications" prong in our articulation of a prima facie case for discrimination in failure to promote. See e.g., Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998); Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997); Batey v. Stone, 24 F.3d 1330, 1334 n.11 (11th Cir. 1994); Hill v. Seaboard Coast Line R.R. Co., 885 F.2d 804, 809-10 (11th Cir. 1989; Wu v.

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[22] The Bundy court stated that,

> to make out a prima facie case [for failure to promote] the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiffs request for promotion was denied.

Bundy 641 F.2d at 951. The court, however, then explained that the above-quoted formula had to be altered slightly to fit Bundy's case because plaintiff Bundy had produced evidence of sexual harassment to support her claim. Id. The Bundy court stated that "[t]he most important difference between [Bundy's] formula and the McDonnell formula is that we are not requiring the plaintiff to show as part of her prima facie case that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the time she was denied a promotion." Id. at 953.

Thomas, 847 F.2d 1480,1483 (11th Cir. 1988); Roberts v. Gadsden Mem'l.Hosp., 835 F.2d 793, 796 (11th Cir. 1988). In only two of these cases, however, does the Perryman formulation give rise to a holding inconsistent with recognition of the Crawford prima facie standard as the law of the circuit .[23]

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[23] In Wu, the court cited the Perryman standard as the correct prima facie standard for a failure to promote case. Wu, 847 F.2d at 1483. The court then held that the district court was correct in determining that the plaintiff had failed to establish a prima facie case of sex discrimination for failure to promote because the plaintiff had "clearly failed to show she was qualified for promotion." Id. at 1484. The court made an alternative holding, however, based on the fact that the plaintiff had "also failed to prove that an equally or less qualified male was promoted during the time of her promotional application." Id.

In Hill, even though the court quoted the McDonnell Douglas standard verbatim - and therefore did not include a relative qualifications element - it stated that "the district court applied the incorrect [prima facie] standard" because the court required the plaintiff, "as part of his prima facie case, to show that a less qualified candidate was promoted in his place." Hill, 885 F.2d at 809 (emphasis omitted). The district court had erred, the Hill court explained, because "[a] plaintiff may establish a prima facie case even if he shows that the non-minority employee selected was equally as well qualified; he need not show, as part of his prima facie case, that his qualifications exceeded those of the non-minority employee." Id. at 809-10 (citing Perryman) (emphasis omitted). Thus, Hill implies that a showing of equal qualifications is properly included as part of the plaintiff's prima facie case, although the court in Hill then partially contradicted this implication by stating that "although [the plaintiff] might prevail [on remand] in establishing a prima facie case, he could not overcome a legitimate business

More importantly, every one of these cases apparently traces its articulation of the prima facie standard back to Perryman's footnote pronouncement.

Thus, in regard to the proper prima facie standard, we are faced with two conflicting lines of precedent. In deciding

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justification - i.e., choosing the most qualified candidates - specifically credited by the district court." Id. at 810.

We believe, however, that neither Wu nor Hill is binding precedent establishing a prima facie standard contrary to that of Crawford. In both Wu and Hill, we reviewed the district court's final judgment. See Wu, 847 F.2d at 1483; Hill 885 F.2d at 807. The Supreme Court, however, has made clear that once the defendant employer goes forward with sufficient evidence successfully to rebut a prima facie case, the determination of whether the plaintiff established her prima facie case is no longer relevant. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff. . . . [T]he District Court in this case should have proceeded to this specific question directly." (internal quotations omitted)). The factfinder's only task at that point is to determine whether the plaintiff has proven, by a preponderance of the evidence, that the defendant employer intentionally discriminated against her. Thus, the question of whether the plaintiff had successfully established a prima facie case was not properly before us in either case. Moreover, as explained infra in the text, Supreme Court precedent overrules the Perryman standard upon which both Wu and Hill are based.

which line of precedent to follow, we are, ironically, faced with two conflicting lines of precedent. See Harris v. Menendez, 817 F.2d 737, 740 n.5 (11th Cir. 1987) (noting conflicting lines of precedent on this issue without choosing between them); Kent v. Baker, 815 F.2d 1395, 1399 n.3 (11th Cir. 1987) (same). One line of precedent holds that when circuit authority is in conflict, a panel should look to the precedents that are most consistent with Supreme Court cases or the weight of authority within the circuit; if there is no sufficiently analogous Supreme Court case and the Eleventh Circuit cases are somewhat evenly divided, then the panel should took to common sense and reason. See Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794, 797-98 (11th Cir. 1988); Dorse v. Armstrong World Indus., Inc., 798 F.2d 1372, 1376 (11th Cir. 1986); Manufacturing Research Corp. v. Graybar Elec. Co., Inc., 679 F.2d 1355, 1360 n.12 (11th Cir. 1982); United States v. Hobson, 672 F.2d 825, 827 (11th Cir. 1982); see also United States v. Gort, 737 F.2d 1560, 1564 (11th Cir. 1984) (following later line of precedent because "it is clearly the more dominant and better reasoned one"). The other line of precedent holds that when circuit authority is in conflict, a panel should look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel. See Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1380 n.10 (11th Cir. 1997); Robinson v. Tanner, 798 F.2d 1378, 1383 (11th Cir. 1986); see also Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions of prior panels are binding on subsequent panels, and can be overturned only by the court sitting en banc).

We believe that the latter of these conflict rules - the "earliest case" rule - is the correct one, because of the

importance of the prior precedent rule.[24] The prior precedent rule, which binds later panels to the decisions of former panels, is essential to maintaining stability in the law. The rule is "emphatic" and "firmly established" in the Eleventh Circuit. See Cargill v. Turpin, 120 F.3d 1366 1386 (11th Cir. 1997); United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993); see also United States v. Steele, 117 F.3d 1231 (11th Cir. 1997) (following prior precedent despite explicit disagreement), rev'd on other grounds, United States v. Steele, 147 F.3d 1316 (11th Cir. 1998) (en banc). Of course, by adopting the "earliest case" rule to resolve intra-circuit splits, we are still in a sense ignoring the prior panel precedent rule - by choosing one line of cases, we are implicitly overruling the other line of cases. This is, however, a necessary consequence of an intra-circuit split, and the rule we adopt is more respectful of the prior panel precedent rule than the alternative "common sense and reason" rule, which essentially tells judges that once they find a division of authority they are free to throw precedent to the wind.[25] In this case, the Crawford standard (established in 1980) predates the Perryman standard (established in 1983),

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[24] We note, however, that our holding in this case would be the same under either of the intra-circuit conflict rules.

[25] "The "earliest case" rule also has the virtue (if consistently applied) of bringing intracircuit splits to a screeching halt; the "common sense and reason" rule, in contrast, can drag such splits out indefinitely as different panels reach different conclusions about what is common sensical and reasonable.

and is therefore the standard to be applied in the Eleventh Circuit.[26]

In addition to the controlling precedent within the Eleventh Circuit, the Supreme Court cases of Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (198 1) and Patterson v. McLean Credit Union 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) have explicitly addressed the issue of relative qualifications in a way that accords with the Crawford standard. The story of the first of these cases, Burdine begins with the case of East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975), decided eight years prior to Perryman. In East, plaintiff Cora East, a welder from Savannah, Georgia, brought suit against defendant Romine, Inc., a construction business that hired welders, under Title VII, claiming that she was denied a position at the company because of her sex. We stated that, to establish a prima facie case of discrimination, East had to show:

> (1) that [she] belong[ed] to a group protected by Title VII; (2) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite [her] qualifications, [s]he was rejected; and (4) that, after [her] rejection the position remained open

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[26] The Crawford standard can in fact be traced back even earlier than 1980 to the case of East v. Romine, Inc., 5 18 F.2d 332 (5th Cir. 1975), discussed infra.

> and the employer continued to seek applicants among persons of [East's] qualifications.

East, 518 F.2d at 337 (citing McDonnell Douglas). We then found that East had established a prima facie case with respect to one of her claims because:

> As a woman, Ms. East is in a group protected by Title VII. She formally applied for a welding job and was at least presumptively qualified on the basis of an application which showed a long history of welding work. Romine, Inc. accepted applications whenever they came in, and Ms. East was not offered a job. Lastly, and the crucial distinction between this claim and that for 1968.[27] Romine hired

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[27] We found that Romine failed to establish a prima facie case with regard to the 1968 claim because "no position was open at the time of East's application and no position 'remained' open. Rather, Romine was not doing any hiring ... for at least the next six months." East, 518 F.2d at 337. Thus, because "there [was] no indication in the record that the decision not to put anyone on the payroll was a subterfuge for a discriminatory intent," East could not show that "after [her] rejection, the position remained open and the employer continued to seek applicants from persons of [her] qualifications." Id. By so holding with regard to East's "1968 claim," we implied that the fourth prong of the McDonnell Douglas - the "remaining open" prong to which both the Crawford and Perryman standards add - was originally included only to ensure that the position applied for was actually "open" at the time of application, and that the defendant employer intended to fill the

> nine welders within six months after East made her application.

Id. at 338 (footnote omitted). We note first that by so finding, we clearly did not require East to prove anything regarding her qualifications relative to the "nine welders [hired] within six months" after she applied for a welding position - the fact that the other welders were hired was sufficient to establish that the position was actually "in contention" at the time that East applied. Thus, East applied, the later- articulated Crawford standard. Most importantly, however, after finding that East had successfully established a prima facie case of sex discrimination, we proceeded to evaluate Romine's rebuttal evidence. We held that the defendant had failed to carry its rebuttal burden because it failed to present evidence of relative qualifications: "[C]omparative evidence lies at the heart of a rebuttal of a prima facie case of employment discrimination.... When a prima facie case of discrimination has been made out, then we cannot presume that the answer lies in the [successful applicant's] judicially cognizable superior credentials." Id. at 339 (emphasis omitted).[28] Thus, in East, we clearly placed relative qualifications in the second stage, of the McDonnell Douglas framework, not the prima facie stage.

Four years later, we adopted much of East wholecloth in Burdine v. Texas Department of Community Affairs, 608

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position.

[28] This statement provides further support for our decision in IMPACT. See supra note 18.

F.2d 565 (5th Cir. 1979). In Burdine, however, we interpreted East as establishing a rule that a defendant could not succeed in defending against a Title VII claim unless it established that the successful applicant for the plaintiff's coveted position was more qualified than the plaintiff. See id., 608 F.2d at 567.

The Supreme Court subsequently granted certiorari in Burdine. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089,67 L.Ed.2d 207 (1981) commonly referred to as "Burdine" in "the McDonnell Douglas-Burdine" framework), the Court held the following:

> The Court of Appeals [] erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. McDonnell Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. The Court of Appeals' rule would require that employer to show that the plaintiffs objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated....
>
> ...Title VII, however, does not demand that an employer give preferential treatment to minorities or women....
>
> The view of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that

> person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Id. at 258-59, 101 S.Ct. at 1096-97 (citations omitted). Thus, the Supreme Court overruled the portions of our decision in East that 1) imposed a burden of persuasion instead of production on the employer during the rebuttal stage of McDonnell Douglas, and 2) required the defendant to prove that the plaintiff was less qualified than the successful applicant to succeed in defending against a Title VII claim. See Burdine v. Texas Dep't of Community Affairs, 647 F.2d 513, 514 (5th Cir. 1981) (reiterating the Court's holdings on remand, and explaining how the Court's decision applies to cases in this circuit); Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 752 (same). The Burdine Court did not, however, overrule the portion of East that placed relative qualifications in the rebuttal stage of the McDonnell Douglas framework. In fact, the Court implicitly affirmed this placement by stating that "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." In other

words, the Supreme Court implied that it is the employer who initially presents evidence of relative qualifications, not the employee.

Of course Perryman and its progeny were decided after the Supreme Court's decision in Burdine. In light of East, however - which remains binding precedent - and of the Court's implicit affirmation of East's relevant holding, we believe that the articulation in the Perryman cases of a prima facie standard that includes proof of relative qualifications is quite suspect.

The Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), further clarifies the place of relative qualifications in the McDonnell Douglas framework and ultimately prohibits us from imposing on the plaintiff the burden of proving relative qualifications at the prima facie stage.[29] In Patterson, Brenda

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[29] Since Burdine, we have continually recognized that relative qualifications belong in the rebuttal stage of the McDonnell Douglas framework, not the prima facie stage. See, e.g., Gilchrist v. Bolger, 733 F.2d 1551, 1553 (11th Cir. 1984) (recognizing as a sufficient legitimate nondiscriminatory reason for denying plaintiff a promotion was "the fact that "[t]he man drawn for the [coveted] position was selected because of his greater knowledge of postal requirements and because of [the plaintiff's] attendance problems); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 527 (11th Cir. 1983) ("The defendants successfully rebutted the [prima facie] presumption through evidence that they selected [the successful applicant] due to his superior qualifications for the position."); Olafson v. Dade County Sch. Bd., 651 F.2d 393, 395 (5th Cir. Unit B 1981) (stating that the defendant employer successfully rebutted

Patterson, a black woman, brought suit against her employer under 42 U.S.C. § 1981, claiming that the employer "had harassed her, failed to promote her ... and then discharged her, all because of her race." Patterson, 491 U.S. at 169, 109 S.Ct. at 2368-69. As its rebuttal to Patterson's prima facie case, the defendant employer claimed that the successful applicants were more qualified than Patterson to perform the position to which she sought promotion. See Patterson v. McClean Credit Union, 805 F.2d 1143, 1147 (4th Cir. 1986) ("[O]nce an employer has advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual .... That was the situation here"). After a jury trial, the district court instructed the jury that Patterson could not succeed on her claim for failure to promote unless she showed that she "was better qualified than the white employee she allege[d] was promoted in her stead." Patterson, 491 U.S. at 170, 109 S.Ct. at 2369. Patterson challenged the instruction on appeal, but the Fourth Circuit affirmed. See Patterson, 805 F.2d at 1146. The Supreme Court granted certiorari to

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the plaintiff's prima facie case by "presenting evidence that [the successful applicant was successful] not because he was a man, but because, in their considered opinions, he was the best person for the job. It was then incumbent on the plaintiff... to prove she was 'the victim of intentional' discrimination" (footnote omitted)); see also Hill, 885 F.2d at 810.

determine whether the district court's instruction, was in error. See Patterson, 491 U.S. at 170-71, 109 S.Ct. at 2369.[30]

On review, the Court held that "the District court erred when it instructed the jury that petitioner had to prove that she was better qualified than the white employee who allegedly received the promotion." Id. at 186, 109 S.Ct. at 2377. The Court then explained that the McDonnell Douglas framework for Title VII applies equally well in section 1981 cases, but that the Court of Appeals had "erred in describing petitioner's burden" under McDonnell Douglas. Id. at 186, 109 S.Ct. at 2378. The Court then explicitly adopted the Crawford standard, and clarified the place of relative qualifications in the McDonnell Douglas framework:

> Under our well-established framework, the plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. The burden is not

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[30] The Court also granted certiorari to determine whether Patterson's claim of racial harassment was cognizable under 42 U.S.C. § 1981 although it did not pertain to the formation of a contract. See Patterson, 491 U.S. at 170, 109 S.Ct. at 2369. The Patterson Court answered this question in the negative, see id. at 171, 109 S.Ct. at 2369, a holding that was later superseded by the 1991 amendments to the Civil Rights Act. See Vance v. Southern Bell Tel. and Tel. Co., 983 F.2d 1573, 1577 (11th Cir. 1993) ("One effect of the 1991 Act, in cases where it applies, is to make the rule in Patterson obsolete by statutorily adding certain categories of post-hiring discrimination to the list of practices liable to suit under section 1981.")

onerous. here, petitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee.

... [T]he employer [must then] present evidence that the plaintiff was rejected, or the other applicant was chosen, for a legitimate nondiscriminatory reason. Here, respondent presented evidence that it gave the job to the white applicant because she was better qualified for the position, and therefore rebutted any presumption of discrimination that petitioner may have established....

Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. In doing so, petitioner is not limited to presenting evidence of a certain type.... [Petitioner] might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was required to make such a

> showing.... It was, therefore, error for the District Court to instruct the jury that petitioner could carry her burden of persuasion only by showing that she was in fact better qualified than the white applicant who got the job.

Id. at 186-88, 109 S.Ct. at 2378-79 (footnote and citations omitted).

Thus, under Patterson, we may never require a plaintiff to establish that she is more qualified than the successful promotee, let alone impose that requirement at the prima facie stage. We believe that Patterson also prohibits us from requiring a plaintiff to prove equal qualifications at the prima facie stage. We cannot imagine that the Supreme Court would speak so strongly regarding the lack of any burden to prove lesser qualifications and still leave available to the defendant at summary judgment the argument that the plaintiff failed to prove equal qualifications, especially in light of its clear affirmation of the Crawford alternatives.

We also note that a prima facie standard that includes relative qualifications as a necessary element runs contrary to the policies underlying the McDonnell Douglas prima facie case. As explained in footnote 10, supra, the prima facie case enables the plaintiff to reach the legal presumption of discrimination that shifts the burden of producing evidence to the defendant employer. This presumption ensures that a plaintiff who cannot establish that the employer harbored a discriminatory animus towards her may still survive a motion for judgment as a matter of law at the close of her case and thus force the employer to articulate its motives for the challenged

employment decision so that the plaintiff has an opportunity to raise an inference of intentional discrimination by circumstantial evidence. The presumption, therefore, accounts for the disparity in access to information between employee and employer regarding the employer's true motives for making the challenged employment decision.

The Crawford standard sufficiently accounts for this disparity. It enables the plaintiff employee to establish a prima facie case or intentional discrimination by presenting evidence that is (1) in the employee's possession already (membership in a protected class, qualification, the fact of application for the position, rejection), and (2) objectively verifiable and easily obtainable (the fact that another person received the coveted position or the fact that the position remained open and available to persons of the plaintiffs qualifications). The Perryman standard, however, introduces the element of relative qualifications - the evidence of which is not likely to be in the plaintiff's possession and may not easily obtainable or objectively verifiable. Only the employer knows whether it truly considered relative qualifications when determining whether to promote the plaintiff, and only the employer can establish what qualifications it actually used to make its promotion decisions. Further, if the employer utilized subjective qualifications in making the challenged decision, there is no way for the plaintiff employee to determine how he "ranked" according to those subjective qualifications in the decisionmaker's mind. It is therefore appropriate to place the burden of articulating those qualifications - if relevant - on the employer, not the employee.

Appendix A

In light of our own precedent and the decisions by the Supreme Court in Burdine and Patterson, we hold that district court in this case erred in imposing as part of the prima facie case a requirement that each plaintiff establish that the successful applicant for his or her coveted position was less than or equally qualified to hold the position. Although a plaintiff may be forced to address relative qualifications if the defendant presents them to rebut the plaintiff's presumption of discrimination, the plaintiff need not introduce evidence regarding relative qualifications before then; she need only prove that she herself was qualified to perform the coveted job.

The district court also made a second error when assessing the strength of the plaintiffs' prima facie case for each of their claims. Several times the court found that a plaintiff had not established a prima facie case with respect to one or more of her claims because the plaintiff failed to identify the successful applicant for the coveted position by name, testifying only as to the applicant's race. A plaintiff, however, need not identify the successful applicant for a position under the McDonnell Douglas prima facie framework; she is only required to establish that the successful applicant is not within her protected class.

We hold, therefore, that the district court erred in entering judgment for the defendants whenever it based on its finding of no prima facie case on either the plaintiff's failure to prove relative qualifications, the plaintiff's failure to identify the successful applicant by name, or on both of these standards. For each erroneously-decided claim, we now examine the record ourselves to determine whether the plaintiff indeed produced evidence at trial that, if credible, was sufficient to

create a prima facie case. For those claims that do pass muster, we vacate the district court's judgment and remand for a credibility finding.[31] For those claims with regard to which the plaintiff failed to present evidence sufficient to support a prima facie case, however, we affirm the district court because a Title VII plaintiff cannot succeed in proving that she was intentionally discriminated against if she does not establish a prima facie case of discrimination. See Bonanni Ship Supply, Inc. v. United States, 959 F.2d 1558, 1561 (11th Cir. 1992) ("[T]his court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court."). In addition, in minority of cases, the district court did not base its judgment on incorrect legal standards, but correctly applied the law. For this group of claims, we review the district court's ultimate finding of nondiscrimination under a clearly erroneous standard. See Eastland v. Tennessee Valley Auth., 704 F.2d 613, 620 (11th Cir. 1983). We find that the record supports the district court's findings, and we are not left with the "definite and firm conviction that mistake has been committed." See

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[31] Because in IMPACT we held that the defendants had failed to satisfy their burden of production under Burdine, if the district court finds a plaintiff's evidence on a given claim credible on remand, it must enter judgment for the plaintiff on that claim. See Burdine, 450 U.S. at 254, 101 S.Ct. at 1094 ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." (emphasis added) (cited in Combs 106 F.3d at 1528)). The trial court is best equipped to make this credibility finding.

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United States v. United States Gysum Co. 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746 (1948). We therefore affirm the court's judgment with regard to these claims as well.

2.

We vacate the court's judgment with regard to the following claims (listed by plaintiff) and remand them for further proceedings:[32]
Diann Walker:

Clerk V, Division of Elections, May 1978 (Tr. 26:16-18).[33]
Staff Assistant II, Corporations (26:31-35).
Staff Assistant II, Elections, February 1979 (26:37).

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[32] The panel in IMPACT found that 1) interveners Ross and Isaac had established a prima facie case at trial for all their claims with respect to every element except non-protected class status under Title VII, and 2) the evidence at trial established that all the plaintiffs were qualified for all the positions they sought. IMPACT 893 F.2D 1191-92 & n.3. We therefore abide by these findings when addressing the strength of each of the plaintiffs' claims infra. See note 13, supra.

[33] We identify each claim by the identifying characteristics noted by the district court in its order on remand. The cites following the claims are cites to the record on appeal. Cites from the trial transcript ("x:x") are in the form of volume:page. Cites to Exhibits are in bluebook form.

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Secretary IV, Archives, May 1980 (26:45-26:47, 55:29-55:31).
Secretary IV, Office of the Secretary of State, May 1980 (55:30-31).

Charles Stewart:

Bureau Chief of Administrative Code, July 1977 (36:12-36:13, 36: 15).
Bureau Chief of Election Records, 1979 (36:14-36:16).
Office Operations Supervisor I, October 1979 (36:28-29).

Dorothy Roberts:

Accountant III, Administrative Services, February 1979 (36:61-36:65).[34]

Barbara King:

Secretary III, March 1979 (38:17, 38:17, 38:17-18).[35]

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[34] The district court also entered judgment for the defendants on Roberts' claim that she was discriminatorily denied a promotion to Accountant IV in Administrative Services. Roberts had claimed that if she had received the Accountant III position, she would have been upgraded to an Accountant IV when that position was reclassified during a Department reorganization. Because Roberts' argument relates to the relief she was entitled to if she had received the Accountant III position, and does not state a separate claim for failure to promote, we do not address this claim.

[35] King established a prima facie case for failure to promote to a Secretary II position in March 1979. See record, vol. 38, pp.18-19. We construe the court's reference to a "Secretary III" position

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Secretary III, General Counsel's Office, April 1979 (38:18-38:19).[36]
Secretary III, Archives, April 1979 (38:24-38:25).
Word Processor Systems Operator I, May 1980 (38:27).
Clerk V, June 1980 (38:28-38:29).
Secretary IV, June 1980 (38:29-38:30).
Secretary IV, August 1980 (38:30-38:31).

Pearl Williams:

Clerk IV, March 1980 (38:50-38:51).
Secretary IV, 1982 (38:52, 38:54-38:55).
Administrative Secretary, 1984/85 (filled by Elinor Kalfas) (38:57-58).[37]

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applied for in March 1979 as a reference to this claim.

[36] Although the district court identified this position as a Secretary III position, King's counsel referred to the position during direct examination of King at trial as a Secretary II position. See record, vol. 38, pp.18-19.

[37] The district court held that Williams had not established a prima facie case for this claim and the next-listed claim because it found that "[t]he personnel cards of [Kalfas and Downing] showed that neither Kalfas nor Downing occupied a position of Administrative Secretary in 1984 and 1985." Downing's personnel card (Defs.' Ex. 266(l)), however, shows that she was indeed promoted to an "Admin. Sec." position in Elections (the section of the Department to which Williams testified she applied) on January 1, 1986. Moreover, Williams testified at trial that persons holding Secretary IV positions were also referred to as "Administrative Secretaries" within the Department, see record, vol. 38, p.57, see also record, vol. 46, p. 48 (identical testimony by Jay Kassees,

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Administrative Secretary 1984/85 (filled by Nancy Downing) (38:57-58).
Secretary IV, 1985 (38:57-58).
Senior Clerk, 1985 (38:58-59; 46:97-106)[38]

Louvenia Jones:

Clerk II, Library Services, January 1977 (30:13 & 43:13); Pls.' Ex. Z-33, p. 167.
Clerk II, Corporations, April 1977 (30:13 & 43:13); Pls.' Ex. Z-33, p. 167.
Clerk III, Elections, July 1977 (30:16-18 & 43:14); Pls.' Ex. Z-33, p. 100.
Staff Assistant I, July 1982 (30:33-34 & 46:112-13); Pls.' Exs. A-5 & 265(l).

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witness for the defense), and Kalfas' personnel card (Defs.' Ex. 272) reflects that she was promoted to a Secretary IV position in Elections on January 3, 1984. We therefore vacate the district court's judgment with respect to Williams' claims for these two positions because we find that the court's finding is unsupported by the evidence.

[38] The district court found that Williams failed to establish a prima facie case with respect to this claim because she testified that she had applied for the position in 1985, but the successful applicant for the position was not hired until in January 1986. Because a plaintiff must only establish that her coveted position remained open or was filled by someone outside her protected class - she need not establish that the position was filled within any certain amount of time - we find the district court's reasoning unsupportable and therefore vacate the court's judgment with respect to this claim.

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Rosa Henderson:

Clerk III, Elections (38:89-90).
Clerk III, Corporations, 1977 (38:87-38:89).
Clerk V, Corporations, 1979 (38:94-38:95).
Clerk V, Corporations, January 1980 (38:96 & 38:94).
Clerk V, 1980 (38:97-38:98).
Documentary Examiner, UCC of Corporations (38:98-38:101).

Delores Conston:

Secretary IV, Elections, April 1977 (39:33-34).[39]

Linda Isaac:

Clerk I, September 1977 (47:74 & Pls.' Ex. Z-33).[40]
Clerk II, September 1977 (47:74 & Pls.' Ex. Z-33 p. 167).
Clerk III, October 1977 (47:74 & Pls.' Ex. Z-3 3 p. 100).
Clerk III, March 1979 (47:74 & Pls.' Ex. Z-33 p.101).
Clerk V, July 1980 (47:74 & Pls.' Ex. Z-33 p. 67).

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[39] The district court did not specifically identify this claim, referring only to "an unknown number of Clerk-Typist IV, Secretary III and Secretary IV positions between 1974 and 1977." Colston, however, established a prima facie case with regard to this claim at trial; thus, we construe her appeal from the court's judgment on remand as including an appeal from the dismissal of this claim.

[40] For all claims brought by plaintiffs Isaac and Ross, we cite only to record evidence establishing that the successful applicant for the position at issue did not belong to the plaintiff's protected class.

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Clerk V, August 1980 (47:74 p.68).

Jacquelyn Ross:

Secretary III, January 1979 (47:73-74 & Pls.' Ex. Z-33 p.80).

On remand, we direct the district court to make credibility findings as to the plaintiff's evidence for each of these claims. If the court credits the plaintiffs' evidence establishing the McDonnell Douglas elements of a prima facie case, it must enter judgment in favor of the plaintiff on that claim. See Burdine, 450 U.S. at 254, 101 S.Ct. at 1094. If the court finds the evidence not credible, it must enter judgment in favor of the defendants.

3.

We affirm the court's judgment with regard to the following claims:

Diann Walker:

Clerk V, Corporations, August 1979 (successful applicant "Buck" Kohr).
Clerk V, Corporations, August 1979 (successful applicant Kevin St. Louis).
Clerk V, Corporations August 1979 (successful applicant Sandra Inks).
Executive Secretary I, Archives, June 1980.
Administrative Assistant II, Elections, August 1982.
Executive Secretary II.

Barbara King:

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Clerk Typist III, February 1979.
Secretary III, Cultural Affairs, April 1979.
Secretary III, Archives, April 1979.
Secretary III, Office of the Secretary of State, March 1980.
Secretary III, Office of the Secretary of State, April 1980.

Pearl Williams:

Clerk-Typist III, Corporations, February 1979.
Secretary IV, April 1982.
Administrative Secretary, 1984/85 (filled by Barbara Birks)

Louvenia Jones:

Bookkeeping Machine Operator, September 1978.
Staff Assistant I, August 1981.
Record Management Technician, Archives, 1984.[41]

Rosa Henderson:

Clerk III, Corporations, 1977.
Microphotographer, Archives, 1978.
Fiscal Clerk II, January 1986.

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[41] The district court's order on remand refers to "about a dozen Clerk I and Clerk II positions" for which Jones testified she had applied before April 1977. The district court considered that Jones' allegations concerning these claims were too vague to make out a case for Title VII relief and therefore dismissed them. We agree; thus, we affirm the district court's judgment with regard to these claims.

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Delores Colston:

Clerk Typist III, July 1978.
Clerk Typist III, August 1979.
Audio-Visual Technician, August 1979.
Clerk Typist III, August 1979.
Secretary III, August 1979. Secretary IV, August 1981.

Jacquelyn Ross:

Clerk Typist III, January 1980.[42]

B.

The plaintiffs next contend that the district court erred on remand by failing to consider employment examination evidence. Employment examination evidence, however, is irrelevant to a prima facie case of disparate treatment; thus, because all of the plaintiffs' claims may now be resolved at the prima facie stage, this issue is moot.

C.

Finally, plaintiffs claim that our mandate in IMPACT directed the district court to recertify the class on remand, and that the court erred by failing to do so. This is simply incorrect.

In its original order, the district court entered judgment against every plaintiff; thus, there existed no representative

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[42] Although the district court purported to pass judgment on this claim, plaintiffs' counsel stated for the record that Ross was withdrawing this claim. See record, vol. 47, p.74.

who could adequately represent a class, and the issue of recertification was moot. On appeal, because we held that the district court had erred in entering judgment for the defendants on all counts, we "opened the door" to a finding of nondiscrimination for at least some of the plaintiffs. Thus, on remand after IMPACT, the issue of recertification was "revived."[43] Because we wished the district court to address the continued validity of its decertification order before we did, however, we specifically reserved judgment on the issue of recertification, stating only that the matter "remain[ed] open for consideration by the trial court on remand." This statement was not a mandate to the district court requiring it to revisit the issue of certification, but merely a reminder to the district court of the legal ramifications of our reversal of its judgment.

On remand, the district court again entered judgment against every plaintiff, thereby "re-mooting" the issue of recertification. In the instant appeal, we hold that the district court erred in entering judgment against several plaintiffs; thus, we have once again provided the district court with possible representatives for the putative class, resurrecting the issue of

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[43] If the trial court, on remand, had entered judgment for one or more putative class representatives, the representative or representatives might have been able to appeal the court's denial of recertification to this court despite the favorable judgment. See Deposit Guaranty Nat'l Bank v. Roper 445 U.S. 326, 339, 100 S.Ct. 1166, 1175, 63 L.Ed.2d 427 (1980) (holding that a district court's entry of judgment in favor of putative class representatives on their individual, claims but "over their objections" does not preclude the representatives from appealing an adverse certification ruling on appeal).

recertification a second time. We still wish, however, to leave the initial determination regarding recertification to the district court. We therefore leave the matter open on remand. We intimate no view as to the propriety of certifying a class if the district court finds that at least one plaintiff is entitled to judgment in her favor.

III.

For the reasons stated above, we AFFIRM the district court's judgment in part and VACATE the judgment in part. We REMAND with directions that the original district court determine, with regard to each vacated claim listed in part II.A.2, whether the plaintiff's evidence of a prima facie case is credible evidence. If the court credits the plaintiffs' evidence establishing the McDonnell Douglas elements of a prima facie case, we direct it to adjudge the defendants liable on that claim, and thereafter to fashion an appropriate remedy.[44] We deny the plaintiffs' request to assign this case to another judge on remand.

SO ORDERED.

CARNES, Circuit Judge, concurring specially:

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[44] This case was filed well before the effective date of the 1991 amendments to Title VII that allow a Title VII plaintiff to recover damages. Thus, the plaintiffs will be limited to equitable relief on remand. See Landgraf v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994) (holding that the 1991 amendments do not apply retroactively); Batey v. Stone, 24 F.3d 1330, 1336 (11th Cir. 1994) (same).

Appendix A

I concur in the court's judgment and most of the language of the majority opinion. I write separately, however, because I am concerned about some of the dicta in footnote 10 of the majority opinion regarding the legal effect of a Title VII prima facie case. Instead of clarifying matters as it seeks to do, the discussion in that footnote may serve only to confuse things, and some of the statements in it are inconsistent with prior circuit precedent.

The majority opinion states: "We note that the prima facie case establishes a presumption, and not an inference, of intentional discrimination." Majority Op. at 10 n.10 (emphasis in the original). While one of the footnotes in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7, 101 S. Ct. 1089, 1094 n.7 (1981), does support that statement, our decisions since Burdine have consistently held that a prima facie case creates an inference of intentional discrimination, see e.g., Jones v. Bessemer Carraway Med. Ctr., 151 F.3d 132 1, 1323 (11th Cir. 1998) (plaintiff has failed to establish prima facie case because "one still cannot infer it is more likely than not that her termination was based on an illegal discriminatory criterion."); Eskra v. Provident Life and Accident Ins. Co., 125 F.3d 1406, 1411 (11th Cir. 1997) ("If a prima facie case is established, the inference is raised that discriminatory intent motivated the adverse employment action . . . ."); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997) ("Once a prima facie case is established, the burden then shifts to the defendant employer to come forward with legitimate non-discriminatory reasons for its actions that negate the inference of retaliation."); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) ("Demonstrating a prima facie case is not onerous, it requires only that the plaintiff

establish facts adequate to permit an inference of discrimination"); Maddow v. Procter & Gamble Co. Inc., 107 F.3d 846, 851 (11th Cir. 1997) ("[O]nce a plaintiff has made a prima facie case, the employer may then rebut the inference of discrimination by providing legitimate, non-discriminatory reasons for its decision."); Walker v. Nationsbank of Florida, 53 F.3d 1548, 1556 n.12 (11th Cir. 1995) ("Whether a prima facie case has been established is a fact specific inquiry: Would an ordinary person reasonably infer discrimination if the facts presented remained unrebutted?"); Coutu v. Martin County Bd. of County Commissioners, 47 F.3d 1068,1073 (11th Cir. 1995) ("A prima facie case of discrimination raises the inference that discriminatory intent motivated the adverse employment action."); Green v. School Bd. of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994) ("[T]he plaintiff must create an inference of discrimination by establishing a prima facie case by a preponderance of the evidence.") (emphasis added in all parentheticals). There are not, as the majority opinion asserts, merely "a few Eleventh Circuit cases" which ostensibly conflict with the majority's statements. Instead, a long line of our prior decisions clearly recognize and emphatically state that a prima facie case will support an inference of discrimination.

The reason that our long line of prior decisions is wrong, explains the majority, is that if we treat the prima facie case as creating an inference of discrimination, "the defendant's legitimate, non-discriminatory explanation would be an affirmative defense [and] [t]he defendant would therefore carry the burden of persuasion in regard to that explanation." Majority Op. at 10-11 n.10. That would come as quite a surprise to all of the judges on the panels that issued the eight decisions cited in the prior paragraph. Every one of those eight

decisions recognizes that a prima facie case creates an inference of discrimination, but none suggests that such an inference transforms the defendant's explanation into an affirmative defense. To the contrary, those decisions recognize, some of them explicitly, that even with the inference created by the prima facie case, the defendant's burden in regard to a neutral explanation is only a burden of production, not one of persuasion. See, e.g., Eskra, 125 F.3d at 1411; Walker 53 F.3d at 1556 ("Once the defendant carries the burden of production, the plaintiff must prove through presentation of a preponderance of the evidence that the employer had a discriminatory intent."); Coutu, 47 F.3d at 1073 ("Once the employer satisfies this burden of production, the plaintiff then has the burden of persuading the court that the proffered reason is a pretext for the true discriminatory reason."); Green, 25 F.3d at 978 ("[O]nce the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to rebut the presumption of intentional discrimination by articulating legitimate, nondiscriminatory reasons for the employee's rejection.") (emphasis added in all parentheticals).

Our prior decisions recognize that whether a particular explanation or response is an affirmative defense is not dependent on whether the plaintiff's evidence is sufficient to support an inference. See also 5 Wright and Miller, Federal Practice and Procedure, Civil 2d § 1271 (discussing criteria used to determine whether a particular defense is an affirmative defense). If the majority opinion's position were correct, in every case where the evidence supports an inference of discrimination, i.e., in every case where the plaintiff's evidence is sufficient to go to a jury, the defendant's response, if any, would be an affirmative defense and the defendant would have the burden of persuasion. Obviously, that is not the law.

Appendix A

The majority opinion itself acknowledges there are at least some situations in which the same evidence that creates a prima facie case, and consequently raises an initial presumption of intentional discrimination, may also suffice to create an inference of intentional discrimination. One example is where the evidence presented to establish a prima facie case is also sufficient to show that the defendants proffered legitimate, non-discriminatory reason is pretextual. That does happen. See e.g., Arrington v. Cobb County, 139 F.3d 865, 875 n.20 (11th Cir. 1998); Majority Op. at 13 n.12. Because a jury may infer intentional discrimination if the plaintiff establishes a prima facie case that also casts doubt on the employer's proffered non-discriminatory reason, see Combs, 106 F.3d at 1532, it follows that evidence establishing a prima facie case certainly will sometimes be enough to establish an inference of unlawful discrimination.

The majority opinion's insistence upon the presumption versus inference distinction serves no good purpose here, is needlessly complex, and is confusing. The distinction serves no good purpose because everyone agrees that the establishment of a prima facie case shifts only the burden of production and not the ultimate burden of persuasion to the defendant. There is no dispute about that. Everyone also agrees that in some cases the same evidence that establishes a prima facie case, without more, will also create a jury issue as to whether the defendant's proffered explanation is pretextual. There is no dispute about that. Those undisputed propositions need not be dressed up in more complex or different terms than we have used over and over in prior decisions. An about-face at this late date complicates matters. In law, as in other intellectual fields, we would do well to keep in mind William of Occam's maxim that the simpler the better, that unnecessary complexities only create confusion. Law ought not be logomachy.

APPENDIX B - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA DATED MAY 19, 1995

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DIANE WALKER, et al.,

Plaintiffs,

CASE NO. TCA 79-895-MMP

v.

ANDRA MORTHAN, Secretary of State, and THE STATE OF FLORIDA,

Defendants.
_____/

ORDER

This cause comes before the Court on remand. It started out as a class action against George Firestone as Secretary of State of the State of Florida and the State of Florida in 1979. An institutional plaintiff, Increased Minority Participation by Affirmative Change Today of Northwest Florida, Inc. ("IMPACT"), filed on behalf of its members the suit, seeking injunctive and monetary relief from the alleged racially discriminatory practices of the defendants in hiring and promotions of black persons in the Florida Department of State. The case was initially certified as a class action and continued as such for approximately five years. However, due to financial

inability of the class to pursue the action fully, the Court decertified the class. The Court also dismissed the institutional plaintiff, IMPACT, because IMPACT had no separate interest apart from that of the individual plaintiffs and thus lacked standing.

The case went to trial on April 1, 1986. The trial lasted eleven days. Following the plaintiffs' case-in-chief, the Court dismissed all disparate impact claims and dismissed the individual claims of Gracie Holton for lack of jurisdiction. On August 11, 1986, the Court issued its findings of fact and conclusions of law on August 11, 1986, after allowing the parties to file a written memorandum in lieu of closing argument. Without deciding whether each claimants made out a prima facie cases, the Court found that none of the claimants sustained his or her ultimate burden of persuasion that he or she was intentionally discriminated and entered judgment in favor of defendants.

Plaintiffs appealed the judgment. In February 6, 1990, the Eleventh Circuit reversed this Court's judgment in a majority decision, *IMPACT v. Firestone*, 893 F.2d 1189, 1197 (11th Cir. 1990), and remanded the case for this Court (1) to decide whether any of the claimants made out a prima facie case on any of their claims and (2) to reconsider this Court's decision to deny recertification. *Id.* at 1194-96. The Eleventh Circuit has also found that this Court erred in holding that the employment examination given to some of the plaintiffs was not a proper part of the Title VII litigation and in dismissing the plaintiff Gracie Holton's claim for lack of jurisdiction. *Id.* at 1197. Therefore, the Court considers these issues on remand.

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DISCUSSION

I. Prima Facie Case

The first issue that this Court needs to consider on remand is whether any of the claimants made out a prima facie case on his or her claims.[1] In order to support a Title VII claim, a plaintiff must first establish a prima facie case of race of discrimination. A plaintiff may establish a prima facie case by presenting direct evidence of discriminatory intent through actions or remarks of the employer which reflect a discriminatory attitude, or in the absence of direct evidence, through circumstantial evidence. *Hill v. Metropolitan Atlanta Rapid Transit Authority,* 841 F.2d 1533, 1539 (11th Cir. 1988), *modified on other grounds*, 848 F.2d 1522 (11th Cir. 1988).

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[1] In *Impact,* the Eleventh Circuit stated that:

> "[I]t is perfectly clear that all of the intervenors, proved that they were black employees, they had made applications for the specified positions, that the positions had been filled by another person, and that, in most if not all cases that other person was white."

Id., 893 F.2d 1191. As discussed *infra,* however, a plaintiff also has to establish that the successful nonminority applicant had *equal or less qualifications* than the plaintiff. Thus, the Court will consider whether the intervenors established that the successful applicants had equal or less qualifications than the intervenors.

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The claimants in this case have not submitted direct evidence of discriminatory intent, but attempted to establish a prima facie case through circumstantial evidence.

In cases where a plaintiff attempts to prove a discrimination claim through circumstantial evidence, the Eleventh Circuit has adopted the following version of the *McDonnell Douglas Corp. v. Green* test for establishing a prima facie case; to establish a prima facie case, the plaintiff must prove by a preponderance of evidence:

(1) that he is a member of a protected class;

(2) that the adverse action was taken against him, e.g. discharge, demotion, failure to hire, or failure to promote;

(3) that a person not a member of the protected class with equal or lesser qualifications received the position; and

(4) that he applied for and was qualified for the position.

Roberts v. Houston County Board of Education, 819 F. Supp. 1019, 1025 (M.D. Ala. *1993)* (citing *Carter v. Miami,* 870 F.2d 578, 582 (11th Cir. 1989)); *Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 809-10 (11th Cir. 1989).

In the present case, the claimants have all proven the first element by showing that they belong to a racial minority. With respect to whether the claimants were qualified for the positions they applied, the defendants introduced evidence that before a person could apply for a position in the Florida

Department of State, he had to get a prior approval from the Florida Department of Administration that he met the minimum qualifications required of the particular position. See *Impact, 893* F.2d at 1192. Except in few instances, the claimants have shown that they received the approval. Thus, the following discussion will focus mostly on whether the claimants have met the second and third prong of a prima facie case.

A. Diann Walker

Plaintiff Diann Walker applied for the position of Clerk V in the Division of Elections in May 1978. The successful applicant was a white female named Mary Anderson. Walker claimed that she had superior qualifications than Anderson because she had supervisory experience that Anderson did not have. Walker, however, offered no evidence to show that she had supervisory experience. In fact, on cross examination, Walker admitted that she had never performed such normal supervisory functions as filling out evaluations and pay slips or deciding on disciplinary actions. Yet, she still maintained she had supervisory experience at the time of application. Her assertion, by itself, does not establish that she had supervisory experience. See *Howard v. B.P. Oil Co.*, 32 F.3d 520 (11th Cir. 1994) (bare assertion by black applicant for gas station dealership that the successful applicant was unqualified was not, in itself, sufficient to withstand summary judgment in the black applicant's racial discrimination suit). Besides this assertion, Walker offered no other credible evidence of relative qualifications. Although Walker was not required to show that she had superior qualifications, she was still required to show that Anderson had equal or lesser qualifications. Having failed to do so, Walker did not make out a prima facie case.

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The next position Walker applied for was the position of Staff Assistant II in the Division of Corporations. The successful applicant was Floyd Self, a white male. Walker claimed that Self was not qualified because he was hired on an emergency basis without competition and was subsequently "waived in." However, Walker did not produce any evidence to prove this claim except her assertion.[2] A further review of the record reveals that Walker had not produced any additional evidence to prove that Self's qualifications were either less than or equal to hers. Therefore, Walker did not make out a prima facie case with respect to this claim.

Walker also applied for the position of Staff Assistant II in the Division of Elections in February 1979. Walker claimed that she was better qualified than Eleanor Ervin, a white female who was selected. Walker argued that she had seniority over Ervin and also that she should have received a preference because she was already employed in the Department of State. Walker, however, produced no evidence to support her assertion of seniority or entitlement to preference. Furthermore, the record establishes that Ervin was not only an employee in the Department of State at the time she applied for the Staff Assistant II position, but also had 18 years of seniority over Walker. Walker did not make out a prima facie case with respect to this claim.

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[2] At trial, the defendants introduced evidence that those persons who were "waived in" were administratively determined to have experience or other training equivalent to the minimum training and experience requirements. Further, Self had superior qualifications: a college degree, course work toward a master's degree, and pertinent work experience.

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Walker also claimed that she applied in August 1979 for three Clerk V positions in the Division of Corporations. One of the persons allegedly selected for those positions was "Buck" Kohr, a white male. The record shows, however, that Kohr did not become a Clerk V until about nine months after Walker said he did and five months after Walker was promoted to a Clerk V position. Further, Walker did not produce evidence sufficient to show that Kohr's qualifications were equal or less than hers. In fact, the record shows that Kohr had better qualifications; he had a master's and bachelor's degree and more than four years of clerical experience. Therefore, Walker did not make a prima facie case with respect to the Clerk V position Kohr received.

The other two persons who were selected for Clerk V positions were Kevin St. Louis, a white male, and Sandra Inks, white female. Walker claims that these individuals were unqualified and "leapfrogged" into the Clerk V position from that of Clerk II. Once again, Walker failed to offer evidence to prove these claims. In fact, the record establishes the contrary. St. Louis was promoted to Clerk-Typist II from his position of Clerk II before promoted to Clerk V. Inks was also promoted to Date Console Operator before she got the position of Clerk V. Furthermore, both St. Louis and Inks had superior qualifications than Walker. St. Louis had a college degree, which Walker did not have, and Inks had over a year more seniority than Walker. As Walker did not introduce evidence of relative qualifications sufficient to allow this Court to form a rebuttable presumption of discriminatory treatment, no prima facie case was made with respect to either of the positions.

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Walker claims that in May 1980 she applied for a Secretary IV position in the Division of Archives. At trial, She testified that she did not know the identity of the successful applicant, except that she was a white female. Without even knowing the identity of the selectee, Walker was in no position to argue that she was at least as qualified as the selectee and that the only reason she did not get the position was improper racial motive.

In her post-trial memorandum, Walker argued that the selectee was N. Revell and that she should prevail on this claim because the defendants did not introduce evidence of Revell's superior qualifications. Walker's argument is without merit. The defendants had no burden whatsoever - either production or persuasion - until Walker proved a prima facie case of intentional discrimination. Having failed to sustain her burden of establishing her having better or equal qualifications, Walker was in no position to put the defendants to the task of disproving her claim.

Walker testified at trial that she applied in June 1980 for an Executive Secretary I position in the Division of Archives and that an unknown white female was hired. Again, this assertion alone is not sufficient to make out a prima facie case.

Walker also testified that she applied in May 1980 for a Secretary IV position in the Office of the Secretary of State and that an unknown white female from the Office of the Attorney General was hired. Walker testified that she was qualified for the position, but also testified that she knew nothing of the qualifications of the person selected. By her own

testimony, Walker showed that she could not make a prima facie case.[3]

The next position Walker applied was that of Administrative Ass't II in the Division of Elections in August 1982. Walker testified that the position went to a white female named Trannie Fewell. Walker argued that Fewell was less qualified because Fewell lacked the requisite experience, particularly supervisory experience. Besides this assertion, Walker did not produce evidence sufficient to substantiate her claim of having equal or better qualifications than Fewell.[4] Walker again failed to make a prima facie case.

Finally, Walker claimed that she was discriminated when she applied for the position of Executive Secretary II. Walker could not remember when she applied for the position, but testified that the position went to a white female named Diane Recupero who had less seniority and equal or less qualifications than her. She, however, offered no evidence to

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[3] After Walker's testimony, her counsel read into the record that T. Dusseault received this position. Then, in the post-trial memorandum, Walker once again argued that she should prevail on this claim because the defendants failed to offer testimony on the qualifications of Dusseault. As discussed previously, it is the plaintiff's first burden to first show that she was at least as qualified as the selectee. Having failed to establish that Dusseault had equal or lesser qualifications, Walker once again did not sustain her burden of proving a prima facie case.

[4] In fact, the record shows that it was Fewell who had superior qualifications - a college degree, two years of experience as a teacher, and one year of seniority over Walker.

support her assertion. She also omitted any mention of this position in her post-trial memorandum.[5] Thus, the Court finds that she did not make out a prima facie case with respect to this claim.

Walker failed to make out a prima facie case on any of her claims because she offered no evidence to prove that she had equal or better qualifications than the selectee. Her evidence consisted of no more than her naked assertions that she was the better candidate. Thus, the Court needs not reach the merits of her claims.

B. Charles Stewart

Plaintiff Charles Stewart asserted that he was discriminatorily denied the position of Bureau Chief of Administrative Code in July 1977. Stewart claimed that he met the qualifications requirement of a four-year degree and three years of administrative experience, but the position went to a white female named Lizzie Cloud who had neither a four-year degree nor three years of administrative experience.[6] The

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[5] This may be due to that the record evidence shows that Recupero was never an Executive Secretary II . Furthermore, even if Recupero were the selectee of the position Walker applied for, Walker still would have failed because the record shows that at the time Recupero was promoted from Executive Secretary I to Staff Asst II, Recupero had more secretarial experience and more seniority than Walker, and was already performing Executive Secretary duties.

[6] Although Stewart's degree was from a school which was not accredited, the Court decided to accept it because the

record establishes the contrary, however. As claimed by Stewart, Cloud did not have a college degree. However, the minimum training and experience requirements for the position had provisions for substituting experience for college time on a year-for-year basis. Cloud's extensive experience more than made up for her lack of a four year degree. Cloud had been continuously employed at the Department of State since 1966 and had been performing most, if not all, of the duties of that position since 1972 while classified a Clerk IV. One of her performance evaluations from 1975, when she was still a Clerk VI, stated that "[d]ue to the workload and type work Liz does, her position should certainly be upgraded to something in a much higher classification bracket." The evaluation was signed by Dorothy Glisson as Division Director and Evaluating Supervisor. On the other hand, Stewart's claims to several years of administrative experience were a lot more tenuous. Some of his experience was less responsible than he tried to make it sound, and in some of the years listed, he only worked part of the Spring and Summer. Overall, the record does not support Stewart's contention that he had superior qualifications, let alone similar qualifications.

Stewart also applied for the position of Bureau Chief of Election Records in early 1979. The successful candidate was a white male named Rodney Bevis. Stewart asserted that he was discriminatorily denied the position because Bevis lacked the requisite four year degree. Again, the record does not support his contention of superior qualifications. Much like the previous position, the minimum training and experience

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Department of Administration accepted degrees from Stewart's alma mater as if the school was accredited.

requirements for this position provided that experience may be substituted on a year-by-year basis for college training. Bevis had a two year associate's degree and additional college-level course work of about one -year. He also had at least six years of managerial experience in his positions as Assistant Manager of Bevis Funeral Home, Campaign Treasurer/Bevis for Congress Campaign and as part owner and manager of the Corner Store. Thus, although Bevis did not have a four year degree, he had a two year degree and a lot more qualifying experience than Stewart. Stewart thus did not establish that Bevis had equal or lesser qualifications.

Stewart next claimed to have applied for a Regional Representative position sometime in 1979. Stewart, however, did not know who, if anyone, received the position. The plaintiff's counsel stepped in and testified that he was satisfied that the recipient was Carl Wall. Without deciding on the propriety of this method of proof, the Court still finds that Stewart failed to make out a prima facie case because he offered no evidence as to Wall's race or relative qualifications.

Stewart lastly claimed that he was discriminated when he applied for the position of Office Operations Supervisor I in October 1979. The minimum training and experience requirements were a four-year degree with a major in business or public administration and four years of administrative/ management experience, provided that additional experience could be substituted for the college training. The position went to a white male named Ira Chester. Stewart contented that Chester was less qualified because Chester had only two years of college. However, Chester had over 20 years of qualifying experience, far in excess of Stewart's claimed experience of several years. The Court therefore finds that Stewart has not

proved by a preponderance of evidence that Chester had equal or lesser qualifications.

C. Dorothy Roberts

Plaintiff Dorothy Roberts applied in February 1979 for an Accountant III position in the Division of Administrative Services. Roberts claimed that she was better qualified than Daniel Corcoran, the successful white male applicant, because she had two and a half years of professional accounting experience and six years of supervisory experience, as opposed to Corcoran's one year and seven months of accounting experience. The record shows, however, that the Accountant III position required the applicant to supervise the State Automated Management Accounting System ("SAMAS"). Whereas Corcoran had already exhibited his competence in analyzing this system, Roberts admitted that she had virtually no experience with the SAMAS. The record thus does not demonstrate that Roberts had equal or superior qualifications than Corcoran.

Roberts' second claim was that, had she received the Accountant III position, she would have gotten the promotion received by Corcoran when the position was upgraded to Accountant IV. As the second claim was contingent on success of the first claim, it must fail as well.

D. Barbara King

Plaintiff Barbara King asserted that she applied in February 1979 for the position of Clerk-Typist III. King did not know who the successful applicant was. Not even knowing the

race of the selectee, King obviously could not make out a prima facie case of racial discrimination.

King next asserted that she applied in March 1979 for a Secretary III position. Although she met the minimum training and experience requirements, King contended, the position instead went to Patty Stewart. However, King had no knowledge of Stewart's qualifications whatsoever. Furthermore, King failed to list Patty Stewart as the successful applicant for any of the positions she applied for in her post-trial memorandum. Having introduced no evidence regarding the selected employee's relative qualifications, King did not establish a prima facie case.

King also claimed that in April 1979, she applied for three Secretary III positions: one in Cultural Affairs, one in the General Counsel's office and one in Archives. King testified that the job in the General Counsel's office went to "Nancy," but did not know who were selected for the other two positions. In her post-trial memorandum, she claimed that only two Secretary III positions were in contention and the positions went to J. Munley and C. Dunn. Again, King utterly failed to make any meaningful comparison of her qualifications and those of the selectees. Thus, King had not established a prima facie case with respect to the Secretary III positions.

King testified that she applied in March 1980 for a Secretary III position in the Office of the Secretary of State, again for the same position in April 1980, and a Secretary III position in the Division of Archives in April 1980. King did not know the name and race of the selectee for her March application. With respect to her April applications, King

testified that the positions went to unknown white persons. Clearly, King failed to establish a prima facie case with respect to these claims.

King also testified that she applied in May 1980 for a Word Processor Systems Operator I position and an unknown white person was selected. In her post-trial memorandum, however, she named two persons as the selectee for the position, without explaining how two people could have been selected as the recipients for one position. Assuming that these two people were actually selected for the position King applied for, the Court still finds that King failed to establish a prima facie case because she offered no evidence showing the selectee's relative qualifications.

King asserted another claim that she applied for a Clerk V position in June 1980, but could not offer any evidence except her assertion that an unknown white person was hired. The Court finds no prima facie case was made.

King testified that she applied for two Secretary IV positions, one in June 1980 and again in August 1980, and in each instance, an unknown white person was selected. In her post-trial memorandum, however, King made only one reference to Secretary IV positions and claimed that L. Price was the unknown white person who was selected. As to one of the Secretary IV positions, King clearly did not make out a prima facie case. With respect to the other Secretary IV position, King still failed to establish a prima facie case because she did not offer evidence showing that she had equal or better qualifications than L. Price.

In sum, King failed to make any prima facie case.

E. Pearl Williams

Plaintiff Pearl Williams testified that she applied in February 1979 for a Clerk-Typist III position in the Division of Corporations. She testified that after the position had been advertised, she was told that it was being deleted without having been filled. Williams was offered a promotion to Magnetic Media Operator around this time. She initially accepted the offer, but later turned it down when she learned the Clerk-Typist III position was being readvertised. Williams, however, could not recall whether she reapplied for the Clerk-Typist III. As a plaintiff in a Title VII suit, Williams had to establish by preponderance of evidence that she in fact applied for the Clerk-Typist III. Because she failed to establish that she applied for the position, she did not make out a prima facie case.[7]

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[7] At trial, Williams implied that the promotion to Magnetic Media operator was offered to her as a way of stopping her from applying to the Clerk-Typist III position. She, however, offered no evidence to substantiate this claim. Even if this Court is to constructively construe that Williams applied for the position, she still did not make out a prima facie case. Williams submitted no evidence of relative qualifications of the selectee, except personnel cards. The personnel cards showed that Mary Haygood, the selectee, had close to three years of seniority over Williams and was in a more responsible position than Williams at the time of selection. Thus, Williams did not establish that her qualifications were at least equal to those of Haygood.

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Williams next applied for the position of Clerk IV in March 1980. She testified that the position went to a white male, Henry Allen. She also testified that she knew nothing of Allen's qualifications. As it was her burden to show that she had equal or better qualifications than Allen, she failed to make out a prima facie case.

Williams also applied in April 1982 for a Secretary IV position. Her own testimony showed that she was not qualified for this position because she failed the required test. Therefore, she has no claim with respect to this position.

Williams applied for another Secretary IV position sometime in 1982. The position went to a white female named Susan Lincicome. William claims that discrimination played a role in this selection. Yet, Williams had no idea whether Lincicome was better or less qualified than her. The record establishes that Lincicome was better educated, holding an associate's degree, and had more experience in state government. Having failed to show that Lincicome had equal or lesser qualifications, Williams did not make a prima facie case.

Williams next claimed that she was discriminatorily denied three Administrative Secretary positions in 1984 and 1985. She testified the positions went to three white females, Barbara Birks, Elinor Kalfas and Nancy Downing. She submitted their personnel cards in support of her claims. The personnel card of Birks showed, however, that Birks resigned from the Department of State in November 1983. The personnel cards of the other two showed that neither Kalfas nor Downing occupied a position of Administrative Secretary in

1984 and 1985. Williams did not make out a prima facie case with respect to these claims.

Williams contended that in 1985 she was discriminatorily denied of a Secretary IV position and a Sr. Clerk position. She claimed the Secretary IV position went to a white female named Laverne Barrett and the Sr. Clerk position went to Miguel Hernandez. Williams submitted the personnel cards of Barrett and Hernandez as evidence. Barrett's card showed that she was never in a position titled Secretary IV. Hernandez's card showed that his position was retitled Sr. Clerk in January 1986. Based on these evidence, the Court is not convinced that these positions were in fact available to others in 1985 and that the individuals named by Williams were the selectees for the positions Williams applied for. Thus, Williams did not make out a prima facie claim with respect to these positions.

In conclusion, the Court finds that Williams did not make a prima facie case as to any of her claims.

F. Louvenia Jones.

Plaintiff Louvenia Jones claimed that she applied for a Clerk II position in the Division of Library Services in January 1977 and was discriminatorily denied the position. Jones, however, did not testify who received the position. Later, the plaintiff's counsel stated that Ann Surrency, a white female, received the position. Her counsel's testimony was the extent of her proof. Jones failed to make out a prima facie case with respect to this claim.

Jones next claimed that she applied for a Clerk II position in the Division of Corporations in April 1977. Jones offered no testimony as to who received the position. The plaintiff's counsel then supplied the information that two white persons were hired as Clerk II in the Division of Corporations in March and April of 1977. This failure to even identify who the successful applicant was, shows that Jones simply did not make a prima facie case.

Jones also contended that she was discriminatorily denied about a dozen Clerk I and Clerk II positions before she was initially hired in April 1977. Yet, she could offer no specific facts about these positions. Therefore, she failed to make prima facie cases with respect to these claims.

Jones claimed that she applied in July 1977 for a Clerk III position in the Division of Elections. Again, Jones offered no testimony regarding who received the position. Plaintiff's counsel stated that it was Pat Bridgham. No more evidence was produced by Jones or her counsel. Jones did not make a prima facie case.

Jones contended that in September 1978 she. was denied a Book-keeping Machine Operator position. She testified she did not apply for this position because a woman in personnel named Kathy Turner falsely told her that she failed the required test. She testified that Kathy Turner was a girlfriend of the successful applicant, David McCullars, a white male. A plaintiff who did not apply for the contested position may still establish a prima facie case if she can show that she was discouraged from applying because of race. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 368

(1977) Jones, however, did not show that racial motive was behind the discouragement. Furthermore, even if this Court constructively construes that Jones applied for this position, Jones did not make out a prima facie case because she did not prove by a preponderance of evidence that McCullars' qualifications were equal or less than those of Jones. Jones offered McCullars, personnel card as the sole evidence. The only thing the personnel card showed was that McCullars was promoted from Mail Clerk I to Account Clerk II and that McCullars had almost two years of seniority over Jones as a career service employee. Jones did not sustain her burden of proving that she was at least as qualified as McCullars by a preponderance of evidence.

Jones testified that she applied for two Staff Ass't I positions, one in August 1981 and the other in July 1982. Jones offered no testimony as to who received the positions. Thus, Jones failed to make out a prima facie case with respect to each of these claims.

Jones' last claim was that she was discriminatorily denied a Record Mgmt. Technician position in the Division of Archives. She testified that she applied for this position sometime in 1984. Her post trial memorandum changed this date to December 1981 and claimed that this position went to Therold "Duke" Deese, a white male. Assuming that Jones indeed applied for this position, she did not make out a prima facie case. The record reflects that Deese had more schooling and experience.

In sum, the Court finds that Jones did not establish a prima facie case with respect to any of her claims.

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G. Rosa Henderson

Plaintiff Rosa Henderson claimed that she was denied a Clerk III position in the Division of Elections in 1976 or 1977. She testified that the position went to an unknown white female. Assertion alone does not establish a prima facie case. Henderson failed to make out a prima facie case with respect to this claim.

Henderson also claimed that she was denied a Clerk III position in the Division of Corporations in 1977, which was awarded to Frieda Chesser. She stated in her post-trial memorandum that this was in 1978. The only testimony advanced by Henderson on relative qualifications was that Chesser was already working in the Division of Corporations. The Court finds that Henderson did not sustain the burden of establishing that she was at least as qualified as Chesser by a preponderance of evidence.

Henderson also testified that she applied in 1977 for another Clerk III position in the Division of Corporations. She testified that the position went to an unknown person. She did not make out a prima facie case with respect to this claim.

Henderson claimed that in 1978, she was denied the position of Microphotographer in the Division of Archives and the position went to a white male named Gregory. In her deposition, however, she testified that this position went to Louvenia Jones, a black female who was a co-defendant in this case. When confronted with this inconsistency at trial, Henderson again changed her testimony and testified that the position actually went to Gary Reeves. Besides these

contradictory testimonies, Henderson offered no evidence regarding qualifications of the selectee.
Therefore, she failed to prove a prima facie case with respect to this claim.

Henderson testified that she applied in 1979 for a Clerk V position in the Division of Corporations and that the position went to Kevin St. Louis, a white male whose qualifications she did not know. She thus did not sustain the burden of proving relative qualifications.

Henderson also testified that she applied in January 1980 for a Clerk V position in the Division of Corporations and that the position went to Tony Fernandez. Yet, she could offer no evidence regarding the qualifications of Fernandez. She did not make out a prima facie case.

Henderson claimed that she applied for the Clerk V position sometime in 1980 after the position became available when Tony Fernandez was being replaced. She claimed that a white female named Karon Beyer received the position. As evidence of Beyer's relative qualifications, Henderson offered Beyer's personnel card. It shows that the Clerk V position was Beyer's initial hire in the Career Service. As such, it does not shed any light on Beyer's previous work experience or other qualifications. The record shows that Beyer had, in fact, nearly twelve years of clerical and supervisory experience in addition to a four-year undergraduate degree, which is not reflected *on* the personnel card. Thus, Henderson did not make out a prima facie case with a preponderance of evidence with respect to this claim.

Henderson next applied for a Documentary Examiner position in the UCC Section of the Division of Corporations. She claimed that this position was awarded to a white female named Irene Luttrell who had eight years less experience. The record shows, however, that Luttrell began working as a secretary or in related positions in 1944. Having offered no other evidence to support her contention of having better or equal qualifications, Henderson did not make out a prima facie case.

Henderson also claimed that she was discriminatorily denied a Fiscal Clerk II position when she applied for the position in January 1986. She testified a white female named Cindy Summers received the position and submitted Summers, personnel card as evidence. The personnel card, however, indicated that Summers was hired for the position in November 1985, two months before Henderson applied. Noting that no other evidence was forthcoming, the Court finds that Henderson did not make out a prima facie case with respect to this claim.

In conclusion, Henderson did not make out any prima facie case.

H. Delores Colston.

Plaintiff Delores Colston claimed that she had been discriminatorily denied an unknown number of Clerk-Typist IV, Secretary III and Secretary IV positions between 1974 and 1977. Colston offered no testimony or evidence as to who received the positions, what their relative qualifications were,

and what their race was. Colston failed to make a prima facie case regarding these claims.

Colston testified that she applied for a Clerk-Typist III position in July 1978, but was discriminatorily denied. Her counsel read into the record that the chosen applicant was a white female named T. Levy. Colston also claimed that she applied in August 1979 for an Audio-Visual Technician job. Her counsel again stated that the position went to A. Tyson. Colston asserted another claim over a Clerk-Typist III position for which she applied in August 1979. In her post-trial memorandum, Colston stated that this position was awarded to C. German, a white female. Colston also claimed that she applied for a Secretary III position in August 1979, which went to a white female named J. Beach, and a Secretary IV position in August 1981, which was rewarded to V. Musgrove, a white female. Colston, however, made no attempt to compare her qualifications with those of the successful applicants to establish that hers were at least as good as theirs. Therefore, Colston failed to establish a prima facie case with respect to each of her claims.

I. Linda Issac

Intervenor Linda Issac claimed that she was discriminatorily denied a Clerk I position in September 1977. Issac did not offer testimony as to who received the position. Her counsel identified the recipient of the position as D. Nichols, a white male. Issac advanced no meaningful evidence concerning the qualifications of Nichols, who later turned out to be a white female. Issac failed to make a prima facie case.

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Issac also claimed that she was denied a Clerk II position in September 1977. Her attorney identified Anne Hartsfield, a white female, as the recipient of the position. No attempt was made to compare relative qualifications of Hartsfield and Issac. Issac failed to show Hartsfield had equal or lesser qualifications.

Issac claimed that she was discriminatorily denied two Clerk III positions, the first of which she applied for in October 1977 and the second in March 1979. She offered no testimony as to who receive the positions. Her attorney claimed that J. Bishop and H. Balogh, both white males, were the selectees. Again, no serious attempt was made to prove that these two individuals had equal or lesser qualifications. Issac failed to make a prima facie case.

Issac claimed that she was discriminatorily denied a Clerk V position in July 1980. Her counsel identified Karon Beyer as the successful candidate. The only evidence offered was Beyer's personnel card. As discussed earlier, this was Beyer's initial hire. The personnel card thus does not show Beyer's previous work experience or other qualifications, as to allow a meaningful comparison of Issac's and Beyer's relative qualifications. The Court therefore finds that Issac did not make out a prima facie case with respect to this claim.

Issac's final claim was over a Clerk V position she applied for in August 1980. According to her counsel, H. Allen, a white male, received the position. Issac again made no attempt to show that the successful applicant had equal or lesser qualifications. Issac failed to make a prima facie case with respect to this claim as well.

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J. Jacquelyn Ross

Intervenor Jacquelyn Ross claimed that she was discriminatorily denied a Secretary III position she applied for in January 1979. She did not know who received the position, but her counsel stated that Mary Brantley, a white female, received the position. Ross made no attempt to establish her relative qualifications vis-a-vis Brantley. Thus, Ross did not establish a prima facie case.

Ross also claimed that she was denied a Clerk-Typist II position in January 1980, but did not know who received the position. She made no mention of this claim in her post-trial memorandum. The Court thus finds that Ross did not make a prima facie case with respect to this claim.

II. Class Recertification

The second issue on remand is class recertification. The Eleventh Circuit found that the decertification based on the class counsel's lack of sufficient financing was in error and directed this Court to consider recertification. *Impact*, 893 F.2d at 1196. In considering recertification, however, this Court is not limited to examine financial ability only and to assume all other class action prerequisites are satisfied; rather, this Court must engage in a rigorous analysis of the posited arguments, and recertify the class only upon being satisfied that all requirements of Rule 23 of Federal Rules of Civil Procedure are met. *General Tel. Co. v. Falcon, 457 U.S. 147, 161,* 102 S.

Ct. 2364, 2372 (1982); *Crawford v. Western Elec. Co., 614* F.2d 1300, 1303-05 (5th Cir. 1980).[8]

A private Title VII suit brought on behalf of a class must satisfy the following two prerequisites. First, there must be an individual plaintiff who has constitutional standing to raise a Title VII claim and who has satisfied the procedural requirements of Title VII. *Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir. 1987) Second, the individual plaintiff must be qualified to represent the members of the class in accordance with the four prerequisites of Federal Rules of Civil Procedure 23(a) and the action must be one of the three types Rule 23(b) identifies. *Id.*

In order to meet the standing requirement, a plaintiff must allege and show that he personally suffered injury. *Id.* If the plaintiff cannot show personal injury, then there is no case or controversy that a court may adjudicate. *Id.* Thus, "[a] named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for any one - not for himself, and not for any other member of the class." *Id.* (citing *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974)).

As discussed previously, none of the named plaintiffs in the present action made a prima facie case with respect to their claims. This failure means that the plaintiffs no longer

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[8] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

have a case or controversy with the defendants. They thus lack standing to seek class certification.

With respect to one remaining claimant, Gracie Holton, she still has a viable claim. *See Impact,* 893 F.2d at 1196. Her individual claim, however, is that although she received the position she sought pursuant to the conciliation agreement entered into between her and her employer after she made a charge of discrimination, the agreement was breached in other respects. She brought the suit to enforce the conciliation agreement in whole. This claim is not typical of the claims of, and does not present a question of law or fact common to, the proposed class of "all past, present, and future black persons employed by the Florida Department of State and of all past, present, and future black applicants for employment with the Florida Department of State," who allegedly did not get promotions they wanted or the positions they applied for because of the discriminatory promotions and hiring practices of the defendants. As a someone who had already received the position sought for, she lacks standing to represent the proposed class.

III. Employment Examination

The third issue is the evidence of employment examination. Before the trial, the Court denied the plaintiffs' motions to require the defendants to furnish information on the examination given to respective candidates for the positions at issue and the scores of the applicants. On appeal, the Eleventh

Circuit ruled that the denial was in error. *Impact*, 893 F.2d at 1196.[9]

Plaintiffs now represent to the Court that they have no use for the employment examination evidence with respect to their disparate treatment claims. They state that the only use of the employment examination evidence would be for disparate impact claims or class claims.

The disparate impact claims were dismissed during trial. The Eleventh Circuit has not disturb that decision in its review of this Court's decision. Thus, the Eleventh Circuit's ruling on the employment examination evidence would have a material effect only if this Court is to recertify this suit as a class action. As discussed previously, however, the Court finds that class certification is not warranted. Therefore, the employment examination is no longer an issue in this case.

IV. Gracie Holton's Conciliation Agreement

Gracie Holton's claim that the defendants breached the conciliation agreement between them was dismissed following the plaintiffs' case-in-chief for lack of jurisdiction. The Eleventh Circuit, however, held that the dismissal was in error.

---

[9] The Eleventh Circuit reasoned that information an the employment examination should have been considered because 1) "it would be reasonable to investigate the employment examination issue based on the broad charges made by the plaintiff" and 2) "there was evidence to the effect that one of the elements considered by the selector for any of these positions was the relative test scores received by the applicants on the examinations." Id. at 1196.

Thus, this claim needs to be fully litigated and adjudicated on its merit. As Holton has completed her case-in-chief, the Court will hold an evidentiary hearing to hear the defendants' case-in-chief.

CONCLUSION

Accordingly, the Court finds as follows:

1. Plaintiffs and intervenors have failed to establish a prima facie case with respect to their disparate treatment claims. The Clerk is directed to enter judgment in favor of the defendants with respect to claims of Diann Walker, Charles Stewart, Dorothy Roberts, Barbara King, Pearl Williams, Lovenia Jones, Rosa Henderson, Delores Colston, Linda Issac, and Jacqueline Ross.

2. Plaintiffs' motion for class recertification (doc. 804) is DENIED.

3. Employment examination will no longer be an issue in this case.

4. Evidentiary hearing for the defendants' case-in-chief with respect to Gracie Holton's claim will be set by separate notice.

DONE AND ORDERED this 19th day of May, 1995.

[stamp] Maurice M. Paul, Chief Judge

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 31, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2898

DIANN WALKER; LOUVENIA JONES;
PEARLIE WILLIAMS; ROSA HENDERSON;
DELORES COLSTON; CHARLES STEWART;
BARBARA KING; DOROTHY ROBERTS,

Plaintiffs-Appellants,

GRACIE HOLTON; CLIFFORD SIMMONS;
GREGORY CRAWFORD; MARGUERITE STEWART,

Plaintiffs,

versus

JIM SMITH, SECRETARY OF STATE,

Defendant-Appellee

On Appeal from the United States District Court for the
Northern District of Florida

ORD-42
(6/95)

Appendix C

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19_, ____F.2d___).

Before: TJOFLAT, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Tjoflat
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX D - RELEVANT STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* states, in relevant part, that:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)(2).

Supreme Court, U.S.
FILED
JUN 4 1999
CLERK

No. 98-1599

IN THE

Supreme Court of the United States

KATHERINE HARRIS, SECRETARY OF STATE
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, BARBARA KING, DOROTHY ROBERTS, JACQUELINE ROSS, LINDA ISAAC and CHARLES STEWART,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KENT SPRIGGS
SPRIGGS & DAVIS, P.A.
324 West College Avenue
Tallahassee, Florida 32301
(850) 224-8700

JERRY G. TRAYNHAM
Counsel of Record
BENJAMIN R. PATTERSON
PATTERSON & TRAYNHAM
315 Beard Street
P.O. Box 4289
Tallahassee, Florida 32315
(850) 224-9181

Attorneys for Respondents

153293

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

32 pp

QUESTIONS PRESENTED

1. Whether, under the *Burdine-McDonnell Douglas* standard, an applicant for employment, who unquestionably meets an employer's published qualifications for employment, must prove, as a part of the prima facie case, that the employer would judge his qualifications as equal to or greater than those of all other applicants qualifying for employment consideration under the published qualifications?

2. Under *Burdine-McDonnell Douglas* the standard, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the Plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?

PARTIES TO THE PROCEEDINGS

The Petitioners' description of the parties below in the caption to the Petition is almost correct. The Secretary of State of Florida is Katherine Harris, who took office on the first Monday of January, 1999. Ms. Harris is automatically substituted pursuant to Rule 35(3). In addition, Intervenors below, Jacqueline Ross and Linda Issac, were omitted from the Petition's caption, and are not identified in a discussion of the parties. Former Plaintiffs below, Clifford Simmons, Marguerite Stewart and Gracie Holton, have settled their claims, and were not parties in the Court of Appeals.

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The Respondents, Diann Walker, Louvenia Jones, Pearlie Williams, Rosa Henderson, Delores Colston, Barbara King, Dorothy Roberts, Jacqueline Ross, Linda Isaac, and Charles Stewart, argue the Court should deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Circuit Court for the Eleventh Circuit, entered in this proceeding on October 28, 1998.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit, rendered on October 28, 1998, is reported at 158 F.3d 1177 (11th Cir. 1998), and is reproduced in the Petitioners' Appendix A, 1a-56a. The Eleventh Circuit denied rehearing and rehearing en banc on December 31, 1998; the order is reproduced in the Petitioners' Appendix C, 87a-88a. The memorandum decision of the United States District Court for the Northern District of Florida (Paul, Maurice M.) has not been reported, and is reproduced in the Petitioners' Appendix B, 57a-86a. Petitioners' first point (Petition at pp. 8-18) timely invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition's jurisdictional reference is inapposite. Rules 10(a) and 10(c) are addressed to the propriety of granting certiorari, rather than to the Court's jurisdiction.

However, Petitioners' second point attempts to invoke the Court's jurisdiction to review the decision in *Increase Minority Participation by Affirmative Change Today of Northwest Florida (IMPACT) v. Firestone*, 893 F.2d 1189 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990). Although Petitioners' second point is compound, the principal question posed is the precise point on which Petitioners' sought and were denied certiorari more than nine years ago.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, reprinted in Petitioners' Appendix D, 89a, which provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sec, or national origin.

STATEMENT OF THE CASE

This action was filed on June 19, 1979. The Applicants[1] originally invoked the jurisdiction of the federal district court

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1. Petitioners' Statement of the Case is substantially correct. Our departures and additions are noted below. Respondents will be referred to as "Applicants," and the Petitioners will be referenced as either the "Employer" or the "Agency." References will be made to the Petitioners' appendix by the designation "App." followed by the page number. Other record references are to the record before the Court of Appeals.

under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, under 42 U.S.C. §§ 1981 and 1983, and pursuant to 28 U.S.C. §§ 1331 and 1334. At the time of trial, the Applicants proceeded only under Title VII. The amended complaint contained allegations of individual incidents of disparate treatment, and allegations of pervasive patterns and practices of discrimination. The pattern and practice claims charged that the employment system relied upon a predominately white cadre of supervisors, who were accorded wide latitude in making subjective decisions regarding hiring, promotion, evaluation and other terms of employment. They charged the employment system, thus, facilitated ready expression of conscious and unconscious racial animus, and, additionally, had a disparate impact on black employees and applicants. The amended complaint also alleged the Employer utilized written employment examinations in making employee selection decisions, which had a disparate impact on black employees and were not justified by business necessity. (R4-203).

The Applicant's individual claims litigated at trial have been characterized by the Court of Appeals and the Employer as both hiring and promotions claims. However, in this case, a distinction between a hiring claim and a promotional claim exists only in the most technical sense. Both claims are more accurately described as selection claims. The employment system did not utilize classical lines of progression, in which employees progressed from one job to another up the advancement ladder, nor were employees selected for promotion without applying for specific vacancies. Current employees and outside applicants generally competed with one another for vacant positions. In order to compete for a vacancy, both current employees and outside applicants were required to be certified as eligible, by meeting the Employer's published

qualifications for the specific position, and file an application for the specific vacancy. An employee hired for a vacancy, whether an outside applicant or a current employee, received an "appointment." The employment system characterized "appointments" by the status of the selectee at the time of appointment. A current employee who received an appointment to a higher position received a "promotion appointment," whereas an outside applicant receiving the same position received an "initial appointment." Approximately two-thirds of the Applicants were seeking promotion appointments.

The case proceeded as a class action for approximately five years, but was decertified when the district court decided counsel were not financially able to adequately represent the class. App. 5a-6a. The decertification of the class was intertwined with the district court's refusal to allow the Applicants access to employment examination and applicant flow data, which the Applicants contended would have enormously reduced the costs of trying the class claims. Later in the litigation, the Applicants moved to recertify the class after satisfying the financial condition on which the decertification was premised. The district court denied that request. *IMPACT*, 893 F.2d at p. 1191.

At trial, each Applicant proved, at a minimum, that he or she was a member of a racial minority (black), that he or she applied for and was qualified for a specific job for which the employer was seeking applicants, that he or she was rejected and the Employer either continued to seek applicants of the same qualifications or filled the position with another applicant. In most instances, the Applicants demonstrated the persons selected to fill the positions they sought were of the white race. *Id.*, at pp. 1191-1192. The Applicants also proved that the selection process was intended to be and is fundamentally

subjective, and that the overwhelming proportion of persons making the hiring decisions were white persons. *Id.*, at 1192. In most cases, the Applicants identified the white decision-maker who made the selection decision by name and position.

Following Applicants' proof, the Employer produced no evidence, which addressed the motivation or rationale for any of the employment selections at issue. *Id.*, at pp. 1192, 1194. Rather, the Employer's counsel argued to the district court after the close of evidence the reasons counsel perceived for the employment selections. The Employer's statements, beginning at page four of the petition, to the effect that it submitted evidence to support a finding that the best qualified applicants were selected, is highly misleading. No witness testified and no evidence was provided which addressed the motivation of the decision-maker or the rationale for the selection for any of the claims at issue. No witness even contended that any of the employment selections at issue were made on the basis of relative qualifications. *Walker*, 158 F.3d at p. 1182 n.8; App. 9a n.8.

The Employer's evidence consisted predominantly of information elicited through its principal personnel official. The personnel officer, who was first employed almost five years after this litigation began, testified it was the Agency's general practice to hire the "most qualified" applicant. There was no testimony as to what the Employer or the particular decision-maker considered as a "qualification." There was no testimony by any decision-maker, nor any other evidence, that any of the employment decisions were made on the basis of the best qualifications. *IMPACT*, at pp. 1192-1194. It is true, as stated at page four of the petition, that the Employer submitted a substantial quantity of documentary evidence, consisting primarily of the contents of personnel files, skeletal employment histories, performance evaluations, and job

applications, including the applications of the individuals selected.[2] There was no evidence, however, that any decision-maker relied upon any specific parts of the documentary evidence, nor was there any evidence submitted with respect to the relative value of employment credentials revealed by the documentary evidence (education, particular kinds of work experience, etc.) to any of the jobs at issue. Indeed, in what appeared to be a trial tactic, the Employer studiously avoided providing any evidence by the persons making the employment decisions, or providing any other specific justification for the selection decisions which the Applicants might challenge as pretextual.

In the Employer's selection process, applications were accepted by the personnel office only from persons meeting the published qualifications for a specific vacancy. The applications were placed in a selection packet, together with a form listing the applicants, their race, sex, and national origin. The packet was provided to the persons making the selection decision. The decision-maker interviewed the applicants, made the selection, recorded his notes justifying the selection on the appropriate sheet, and returned the packet to the personnel office, where it was thereafter maintained. Florida's public records act, Chapter 119, Florida Statutes, prevented routine destruction. Plaintiffs' Trial Exhibit Z51-B pages 13-30. None of these records were produced by the Employer at trial.

The Employer never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

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2. Job applications prepared by the selectees were admitted over hearsay and materiality objections, without any foundation, other than that they were received by the Employer. There was no evidence the applications were relied upon by the decision-makers.

The trial court assumed, without deciding, that the Applicants established a prima facie case and ruled that the Employer had sufficiently met its burden of production. The district court held:

> In this case, the Defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance, the Defendant denies that race affected the decision. Making that statement satisfies the Defendants' light burden.

R17-664-6. The district court held the Employer met its burden of articulation by merely *contending* that the persons believed to be most qualified were hired, and because it *denied* that race was a factor in its decision. *IMPACT*, at p. 1193. The district court then held the Applicants failed to show the Employer's articulations were pretextual. In a claim by claim analysis, the district judge reached this conclusion by assuming all of the employment decisions were made on the basis of relative qualifications, taking on the mantle of the Employer, and deciding himself that the qualifications of the white selectee were superior in every instance. The court made these findings in the absence of any evidence as to what qualifications were valued by the Employer for any of the positions.[3] The only evidence of

3. Predictably, this approach produced conflicting results. For example, the trial judge found that even though Applicant Walker had greater experience than a white selectee, the selectee was more qualified because he possessed an unrelated college degree. R22-899-7. Four pages later in his order, the district court found that even though Applicant Stewart had the college degree lacked by the white selectees, the white selectees, for three separate positions, were better qualified because they possessed greater experience. R22-899-11-13.

what qualifications were valued by the Employer were the published requirements for each job, which both the appellate panel and the district court agree were met by the Applicants on every claim.

Applicants appealed the merits decision to the Eleventh Circuit Court of Appeals, raising five issues meriting treatment by the panel: (1) Whether the Employer sufficiently articulated a legitimate non-discriminatory reason for each employment selection; (2) whether the district court improperly discounted the expert testimony submitted by Applicants; (3) whether the trial court erred in not recertifying the class; (4) whether the trial court erred in excluding employment examinations; and (5) whether the district court erred in dismissing one of the individual claims. *Walker*, at p. 1181; App. 8a.

The Eleventh Circuit panel held the Employer failed to articulate a clear and reasonably specific legitimate non-discriminatory reason for each of the employment selections at issue. "In not a single case, did the defendants offer proof by any person who made the employment decision, *or by any other person*, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." *IMPACT*, at pp. 1194-1195; App. 8a-9a; emphasis supplied). The Court reasoned the Employer's proof must be judged, in part, by the extent to which it fulfilled the function of framing the factual issue, so that the opposing parties would have a full and fair opportunity to demonstrate pretext. "[T]he defendants offered no evidence explaining any employment decision." *IMPACT*, at p. 1194; App. 9a. The panel held that a defendant's articulation must address the employment selection in a way which explains with reasonable specificity why the particular selection was made. A simple statement that the defendant has a general policy of hiring the best qualified

applicant will not suffice. The Court remanded to the trial court for an initial determination whether a *prima facie* case was established by any of the Applicants. *Id.*

The Eleventh Circuit also determined the trial court improperly eliminated the issue of employment examinations from the litigation. The panel found the elimination of the employment examination issue was intertwined with class certification issues, and remanded for a determination whether the class should be recertified. The Court also reversed the Rule 41(B) dismissal of one of the individual claims. The Court determined the trial judge did not abuse his discretion in rejecting the testimony of the Applicants' expert witness. App. 10a.

On remand, the district court denied a motion by Applicants for judgment on liability, holding, despite the Eleventh Circuit's opinion, that the Employer had articulated sufficiently to avoid judgment.

> In this case, the defendants introduced evidence of nondiscriminatory reasons. . . . Taken as true, however, the defendants' evidence does permit the conclusion that there was a nondiscriminatory reason for the adverse action. Thus, the defendants have met the burden of producing evidence.

R22-879-11-12. The district court disposed of Applicants' employment testing claims by holding they could not be litigated under a disparate impact theory. R22-879-13. Finally, on May 22, 1995, five years following remand, the district court entered an order finding that none of the Applicants had proven a prima facie case, that class

certification should be denied, and reaffirming that the examination claims could not be tried under a disparate impact theory and were thus eliminated from the case. R22-899.

In finding Applicants had not proven a prima facie case, the judge held Applicants were required to prove their comparative qualifications were equal to or better than those of the white selectees. He methodically found Applicants had not met this burden, using similar, and in some cases, identical language as that reversed by the appellate panel's earlier decision. This district court simply shifted the analysis he had previously applied to the pretext stage of the litigation to the prima facie case analysis. R22–899-5-26. The trial court reasoned class certification should be denied, because no Applicant had established a prima facie case, and thus lacked constitutional standing to assert the claims of the class. R22-899-3-27.

Applicants again appealed to the Eleventh Circuit Court of Appeals, raising the following issues: (1) By requiring Applicants to prove their comparative qualifications were equal to or better than the white selectees as a part of the prima facie case, the district court applied an incorrect legal standard; (2) the district court violated the law of the case and the mandate rule by holding the Employer had met its articulation burden, and in failing to adhere to other appellate findings of fact and law; (3) the district court erred in failing to permit Applicants to litigate their employment testing claims under a disparate impact theory; and (4) the district court applied an incorrect legal standard in denying class certification.

On appeal, the Eleventh Circuit affirmed in part, reversed in part and remanded for further proceedings.

First, the court held the district court erred in finding none of the Applicants had established a prima facie case. The appellate panel held that the district court, in requiring the Applicants to prove they were equally or better qualified than the white selectees, failed to apply the binding precedent of the circuit, expressed in *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). In reaching this conclusion, the circuit court found it necessary to resolve seeming and actual inconsistencies in the circuit's precedent. The panel noted that most of the language in Eleventh Circuit cases appearing to lend support to the district court's formulation was actually dicta. *Walker* at pp. 1186-1188; App. 23a-27a. The circuit court identified two cases arguably containing conflicting precedent, *Hill v. Seaboard Coast Line R.R. Co.*, 885 F.2d 804 (11th Cir. 1989); and *Wu v. Thomas*, 847 F.2d 1480 (11th Cir. 1988). In resolving the potential *intra*-circuit conflict, the panel applied the Eleventh Circuit's prior precedent rule, which requires panels of the circuit to adhere to precedent established by earlier panels of the court, unless the circuit, sitting en banc, elects to alter the circuit's precedent. *Walker*, at pp. 1187-1189; App. 28a-30a.

> The prior precedent rule, which binds later panels to the decisions of former panels, is essential to maintaining stability in the law. The rule is "emphatic" and "firmly established" in the Eleventh Circuit.

Walker, at p. 1188; App. 29a. Thus, the circuit panel held the district court must apply the controlling precedent of the circuit expressed in *Crawford*, which described the prima facie case as follows:

> Plaintiffs may establish a prima facie violation by showing that they are members of a group

> protected by title VII, that they sought and were qualified for positions that [the employer] was attempting to fill, that despite their qualifications they were rejected, and that after their rejection [the employer] continued to attempt to fill the positions or in fact filled the positions with [white persons].

Id., 614 F.2d at 1315. The appellate panel did not hold, as represented by the Petitioner at page 7 of the petition, that the prima facie case formulation may not be modified or adapted where circumstances require. The panel simply noted "in passing" that several different standards for the prima facie case had evolved in the Eleventh Circuit, and that "differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, . . ." *Walker*, at p. 1185; App. 20a .

The panel also held the circuit's binding precedent set forth in the Crawford decision was well supported by this Court's later decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

Next, the appellate court examined the record to determine for itself whether the Applicants had submitted evidence at trial, which, if found credible by the district court, would have established a prima facie case. The panel found the Applicants had introduced such evidence on a number of their claims, and vacated the judgments. On these claims, the court remanded for the district court to determine whether the evidence supporting the prima facie case was credible. Citing

Burdine, *supra*, the panel instructed the district court it must enter judgment for the Applicants on such claims as it finds the evidence supporting the prima facie case credible. *Walker*, at pp. 1193, 1198; App. 42a. Where the panel found the evidence supporting the prima facie case insufficient, or there were other grounds to support the judgment, the court affirmed. *Id.*, at pp. 1193-1197; App. 41a-43a.

The panel found that its decision on the prima facie case issues had mooted the Applicants' disparate impact employment testing claims. Finally, the court held its ruling had revived the class certification issues, and left the issue open if the district court determined that at least one of the Applicants was entitled to judgment. *Id.*, at p. 1196; App. 50a-52a.

REASONS FOR DENYING THE WRIT

I.

WHETHER, UNDER THE *BURDINE-MCDONNELL DOUGLAS* STANDARD, AN APPLICANT FOR EMPLOYMENT, WHO UNQUESTIONABLY MEETS AN EMPLOYER'S PUBLISHED QUALIFICATIONS FOR EMPLOYMENT, MUST PROVE, AS A PART OF THE PRIMA FACIE CASE, THAT THE EMPLOYER WOULD JUDGE HIS QUALIFICATIONS AS EQUAL TO OR GREATER THAN THOSE OF ALL OTHER APPLICANTS QUALIFYING FOR EMPLOYMENT CONSIDERATION UNDER THE PUBLISHED QUALIFICATIONS?

The Eleventh Circuit's decision in this case closely follows the instructions of this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),

Burdine, *supra*, and *Patterson*, *supra*. The Petitioners' argument that plaintiffs, who have shown they are fully qualified to assume the employment positions at issue, must also prove, as a part of the prima facie case, their qualifications were equal to or greater than the individuals selected by the employer misconceives the functioning and purpose of the various elements of the circumstantial proof model.

One obvious flaw with the Employer's argument is that it ignores that the *Burdine-McDonnell Douglas* formulation was calculated to deal with disparate treatment.

The plaintiff's *prima facie* case serves the important function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S. Ct. 1094. After the plaintiff establishes a *prima facie* case, the burden of production passes to the defendant to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason." *Id.* The defendant's articulation serves the important functions

> to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 101 S. Ct. 1095. The sufficiency of the defendant's articulation is to be judged by the extent to which it fulfills the foregoing functions. *Id.* Where the defendant fails to meet its light burden of explaining the reasons for its actions, however, the defendant denies the plaintiff an opportunity to demonstrate pretext. "[I]f the employer is silent in the

face of the presumption [created by plaintiff's *prima facie* case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*, at 101 S. Ct. 1094. If the defendant carries its light articulation burden, the burden of persuasion remains with the plaintiff to persuade the trier of fact the defendant's proffered reason is a pretext for discrimination.

Where a plaintiff has demonstrated he or she is fully qualified to assume the employment position at issue, requiring a heightened demonstration of qualifications — proof that the employer would have judged the plaintiff's qualifications equal to or greater than those of the selectee — does not serve the purposes of the circumstantial proof model, and will often present the plaintiff with an impossible burden.

The *Burdine-McDonnell Douglas* circumstantial proof model focuses on intentional discrimination. Where a proof formulation requires the plaintiff to address factors unrelated to the decision-maker's intent, it runs at cross purposes to the *Burdine* formulation. The question is not whether a fair-minded person might have reached the decision urged by the employer, but, rather, whether the actual decision-maker was motivated by racial considerations. The *Burdine-McDonnell Douglas* model "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254 n.8, 101 S. Ct. 1089 at 1094 n.8. An employer is not required by Title VII to hire the best qualified applicant; it need only make its selection free of a discriminatory animus. *Burdine*, at 450 U.S. 258-59. Thus, one does not address the question of intentional discrimination by requiring a plaintiff to demonstrate comparative qualifications before the employer articulates the employment selection was made on that basis. In every case where the

employer did not make its selection based upon relative qualifications, the prima facie case model argued by the Employer would require a plaintiff to address his or her evidence to facts not at issue between the parties. This alternative model, in fact, conflates the *Burdine-McDonnell Douglas* model, by assuming the employer made its decision in all cases based upon relative qualifications, and collapsing the plaintiff's burden of showing pretext into the prima facie case. The modified proof model would, ironically, insulate a selection decision made purely on the basis of race on every occasion the plaintiff could not demonstrate comparative qualifications equal or greater than those of the selectee.

A requirement of proof of comparative qualifications in these circumstances also runs afoul of *Burdine's* admonition that the prima facie case is not "onerous," *id.* at 450 U.S. 253, by posing an often impossible burden on the plaintiff. The Employer's argument would require proof prior to an employer's "reasonably specific" articulation of why the selection decision was made. The relative value of personal characteristics that may be denoted as "qualifications" varies widely, and may be infused with subjective, personal, technical or other preferences which are not readily apparent. The court of appeals, in *IMPACT*, noted some of the pitfalls in treating qualifications in the abstract.

> Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work of any combination of them.

IMPACT, 893 F.2d at p. 1194. The *IMPACT* panel noted that a mere statement by counsel at the articulation stage

that the employer hired the best qualified applicant "leaves no opportunity for the employee to rebut the given reason as pretext." *Id.* Moving the burden of adducing evidence of comparative qualifications to the prima facie case greatly exacerbates the difficulty noted. "Only the employer knows whether it truly considered relative qualifications when determining whether to promote the plaintiff, and only the employer can establish what qualifications it actually used to make its promotion decisions." *Walker*, at p. 1193; App. 40a.

The Employer's argument, at pages 8-14 of the Petition, that the circuit panel decision conflicts with prior decisions of this Court is grounded in an incorrect premise.[4] The argument assumes, incorrectly, that the Eleventh Circuit panel held the prima facie case may never be modified. To the contrary, the circuit panel simply "noted in passing" that a number of different standards for the prima facie case had evolved in the Eleventh Circuit, and that "differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, but one which is exacerbated in Title VII jurisprudence because of the general instability that pervades this area of the law." *Walker*, at p. 1185; App. 20a. This observation by the panel, which is purely dicta, does no more than suggest caution in making changes in the prima facie case in order to promote stability in the law. The panel did not bar any modification of the prima facie case. Indeed, the *Crawford* decision, recognized by the panel as the circuit's binding precedent, is itself an

4. Although not stated in the caption, the Employer also appears to argue, at page 8 n.5 of the Petition, that the panel decision conflicts with other Eleventh Circuit cases. Resolution of *intra*-circuit conflicts is ordinarily left to resolution by the various circuits, and is not a substantial ground for a grant of certiorari. *See* Rule 10.

adaptation of the prima facie case described in *McDonnell Douglas*. Because the *McDonnell Douglas* standard arose from a case in which there was no showing the employer had ever hired anyone for the position sought by the plaintiff, the Eleventh Circuit panel explained that *Crawford* adapted the "*McDonnell Douglas* standard to address a situation in which the plaintiff 'loses out' to another applicant." *Walker*, at p. 1186; App. 21a.

The decision in this case does not conflict with decisions of this Court. In fact, the *Crawford* adaptation of the prima facie case mirrors this Court's later decision in *Patterson*. *Crawford* adapts the fourth element of *McDonnell Douglas* to require a plaintiff to prove that "after rejection [the employer] either continued to attempt to fill the positions or in fact filled the positions with [persons outside the plaintiff's protected class]." *Crawford*, at 614 F.2d 1315. *Patterson* described this element in virtually identical terms.

> Here, petitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that *after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee.*

Id., at 491 U.S. 186-187 (emphasis supplied). It is difficult to discern how a standard, such as that in *Crawford*, which mirrors this Court's articulation in *Patterson*, could materially misstate the requirements of the prima facie case.[5]

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5. The panel also found that, since *Patterson* held a district court could not require a plaintiff to show equal or superior qualifications (Cont'd)

The Employer's arguments, at pages 15-18, that the panel decision conflicts with the decisions of other circuits is likewise incorrect. Each of the cases posited by the Employer uses language to describe the fourth element of the *McDonnell Douglas* standard which paraphrases the language used by this Court. From *McDonnell Douglas*, the fourth element requires a plaintiff to prove that "the position remained open and the employer continued to seek applicants from *persons of complainant's qualifications*." *Id.*, 411 U.S. at p. 802 (emphasis supplied). Given the development of the prima facie case in subsequent cases, and particularly the formulation stated in the *Patterson* decision, the terms "persons of complainant's qualifications" certainly refers to element two — that is, to other persons qualified to hold the position.

All of the cases posited as in conflict with the panel decision describe this fourth element with such terms as "qualifications similar to those of the plaintiff," *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 327 (1st Cir. 1996), "person of comparable (or lesser) qualifications", *Carney v. Textron Automotive Co.*, 165 F.3d 26 (6th Cir. 1998), "persons with comparable qualifications," *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir. 1997), "person of similar qualifications," *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1126 (8th Cir. 1997), "similar or lesser qualifications for the position," *Pafford v. Herman*, 148 F.3d 658, 669 (7th Cir. 1998). Each of the posited cases purport to have drawn this language from *McDonnell Douglas*, and the language should be viewed as conveying a similar meaning. None of the cases

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(Cont'd)
in order to establish pretext, it was not reasonable to believe comparative qualifications could be permitted to burden the prima facie case. *Walker*, 158 F.3d at pp. 1191-1192; App. 35a-40a.

present circumstances which remotely suggest the circuit court applied the language as did the district court in this case.[6]

In *Lehman*, the district court had decided Mr. Lehman failed to prove a prima facie case. *Id.*, 74 F.3d at 328. The circuit court, however, found the plaintiff had not shown pretext, thus relieving the court of "tarry[ing] over the prima facie case issue." *Id.* The discussion of the prima facie case issue is certainly dicta, and, importantly, the context of the decision does not show conflict. In *Carney*, the circuit court found the plaintiff clearly was not qualified, making any discussion of the fourth element of the prima facie case dicta. *Id.*, 165 F.3d at __. Moreover, *Carney* was issued by the panel under Circuit Rule 24, which severely limits its value as precedent, and recommends against publication. *Cordova* reversed a summary judgment determination by the district court, finding the plaintiff had proven a prima facie case. In doing so, the circuit court used the terms "persons with comparable qualifications," as synonymous with "other persons qualified for the position." *See id.*, at 124 F.3d 1148 and n.4. Moreover, nothing in the opinion suggests the court required Ms. Cordova to prove, at the prima facie case stage, her qualifications were at least equal to those of other applicants. In *McCullough*, the court reversed a finding of summary judgment, finding the plaintiff established a prima facie case, but Ms. McCullough was so plainly superior to the white selectee that the court had no occasion to construe the fourth element of the prima facie case. In *Pafford*, the circuit court found the plaintiff was not qualified for the promotion, thus any discussion of the fourth element is dicta. Although the court noted Ms. Pafford also failed to show she was "as

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6. Indeed, the description of the fourth element of the prima facie case is dicta in most of the posited cases.

qualified or more qualified than the four Caucasian employees who were promoted," it is certainly not clear whether the court would have found her equally qualified had she proven element two — that she met the qualifications for the position. In short, the cases posited by the Employer do not show a conflict among the circuits.

II.

UNDER *MCDONNELL DOUGLAS-BURDINE* STANDARDS, MAY A DEFENDANT MEET ITS ARTICULATION BURDEN BY MERELY CONTENDING IT HAS A GENERAL POLICY OF SELECTING THE BEST QUALIFIED APPLICANT AND PRODUCING EVIDENCE OF THE PERSONAL CHARACTERISTICS OF THE PLAINTIFF AND THE PERSON SELECTED, WITHOUT PRODUCING ANY EVIDENCE OF THE SPECIFIC REASONS FOR ITS SELECTION DECISION. IN OTHER WORDS, IS IT SUFFICIENT FOR A DEFENDANT TO PROVIDE THE TRIAL JUDGE SOME PART OF THE DATA WHICH MAY HAVE BEEN AVAILABLE TO AND CONSIDERED BY THE DECISION-MAKER, AND ALLOW THE JUDGE TO DETERMINE WHETHER ANY NON-DISCRIMINATORY RATIONALE CAN BE FASHIONED FROM THE AVAILABLE DATA?

Under this point, the Employer attempts to invoke the Court's jurisdiction to review the decision in *Increase Minority Participation by Affirmative Change Today of Northwest Florida (IMPACT) v. Firestone*, 893 F.2d 1189 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990). Petitioner attempts to bootstrap the issue by compounding it with the question whether the district court is required to enter judgment against a defendant

who fails to meet its articulation burden. Nevertheless, the principal question posed is the precise point on which Petitioners' sought and were denied certiorari more than nine years ago. The strictures of law of the case apply to this issue, and the Employer has made no argument to support its attack on *IMPACT*, *supra*.

The Employer is incorrect in its implied argument that the decision in *IMPACT* violates the precedents of this Court. In no sense did *IMPACT* hold, as urged by the Employer, that the burden of production can only be met by the oral testimony of the actual decision-maker. The appellate court merely rejected, as insufficient under this Court's precedents, an articulation which consisted of "[i]n not a single case, . . . proof by any person who made the employment decision, *or by any other person*, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." *IMPACT*, 893 F.2d at p. 1194. The Eleventh Circuit panel was concerned, not with who provided the Employer's evidence, but with the content and quality of the explanation given.

In this case, the Employer submitted no evidence of the reasons for any of the employment decisions at issue. This was not a case in which the rationale for the employment selections was reasonably discernible by the Applicants. Even had the Applicants assumed the Employer relied upon "qualifications," they had no method to discern what each decision-maker considered a "qualification," or what qualifications were pivotal in the selection for each job at issue. Neither the Applicants, nor the district court, received any explanation from the Employer from which to determine why the employment selections were made.

Rather than holding a defendant must produce as evidence the oral testimony of the actual decision-maker, or that a defendant is limited, in making its articulation, to any particular character of admissible evidence, the Court of Appeals held, simply, that the employer's explanation must be made through admissible evidence, not the contentions of its counsel after trial. The explanation must be clear and reasonably specific, and must address the reasons for the employment decision at issue.

> We determined in *IMPACT* that the defendants had failed to present any probative evidence at trial regarding the motivations of the decision-maker with regard to any of the plaintiffs' claims. *See IMPACT*, 893 F.2d at 1194 ("In this case, the defendants offered no evidence explaining any employment decision.") Although a State official testified that the Department of State hired only the best-qualified individuals for State jobs, the defendants presented no evidence regarding the particular decisions challenged by the plaintiffs. Thus, we held that the defendant failed to carry its burden of production under *Burdine*, explained in part II.A. *infra*. *See IMPACT*, 893 F.2d at 1193-94.

Walker, 158 F.3d at p. 1182 n.8; App. 9a. Thus, the IMPACT decision did not limit the Employer to any particular kind of evidence; it held, simply, that the Employer did not submit any evidence probative of the reasons for the employment decisions.[7]

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7. The Employer never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

The Employer also appears to argue that the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), alters the consequences for failing to meet the employer's articulation burden. The plain language of the Court's decision *in St. Mary's* is otherwise.

> At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, . . . the defendant has failed to meet its burden of production — i.e. has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials).

Id., at 509 U.S. 509. Since, in this case, the Employer "failed to present any probative evidence at trial regarding the motivations of the decision-maker", *Walker* at p. 1182, App. 9a n.8, the Employer effectively stood silent in response to plaintiffs' evidence.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

JERRY G. TRAYNHAM
Counsel of Record
BENJAMIN R. PATTERSON
PATTERSON & TRAYNHAM
315 Beard Street
P.O. Box 4289
Tallahassee, Florida 32315
(850) 224-9181

KENT SPRIGGS
SPRIGGS & DAVIS, P.A.
324 West College Avenue
Tallahassee, Florida 32301
(850) 224-8700

Attorneys for Respondents